UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
W.R. GRACE & CO., *et al.*,	.	Case No. 01-01139(JKF)
	.	(Jointly Administered)
Debtors.	.	
	.	Jan. 23, 2007 (10:18 a.m.)
	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

THE COURT: Good morning, everyone. Please be seated. I'm sorry for being so late. It just took a little longer upstairs than I thought it would this morning. Okay, this is the matter of W.R. Grace, 01-1139. The parties I have listed to appear by phone are: Erin Van Valkenburg, that's my assistant; Michael Davis, Robert Guttmann, Amelia Wong, Tiffany Cobb, Peter Shawn, Andrea D'Ambra, John O'Connell, Kenneth Thomas, David Beane, Michael Joyce, Brian Kasprzak, Leslie Epley, Mark Plevin, David Liebman, Rita Tobin, Sandy Esserman, Martin Dies, Darrell Scott, Terence Edwards, Sean Walsh, Arlene Krieger, Craig Moran, Andrew Craig, Oscar Mockridge, Stephanie Kwong, Guy Baron, Marti Murray, Beau Harbour, Ashok Vasvani, Andrew Chan, Steven Eisman, Warren Smith, Lewis Kruger, Barbara Seniawski, David Siegel, Mark Sheinitz, David Parsons, Alex Mueller, Christina Kang, Sarah Edwards, John Mackin, Elizabeth DeCristofaro, Daniel Glosband, Christopher Candon, Roger Frankel, Sara Gooch, Richard Wyron, Debra Felder, Ritwik Chatterjee, Jonathan Brownstein, David Mendelson, Sal Bianca, Sam Blatnick, Stephen Vogel, Matthew Kramer, Van Hooker, Paul Norris, and Jay Hughes. I'll take entries in court, please.

MR. BERNICK: Good morning, Your Honor. David Bernick for Grace.

MS. BAER: Good morning, Your Honor. Janet Baer for Grace.

MR. O'NEILL: Good morning, Your Honor. James O'Neill for Grace.

MR. BECKER: Good morning, Your Honor. Gary Becker for the Equity Committee.

MR. PASQUALE: Good morning, Your Honor. Ken Pasquale for the Creditors Committee.

MR. RESTIVO: Good morning, Your Honor. James Restivo for Grace.

MR. FINCH: Good morning, Your Honor. Nathan Finch for the Asbestos Claimants Committee.

MR. MALADY: Good morning, Your Honor. Ray Malady for the Futures Claimants Representative.

MR. BAENA: May it please the Court, good morning, Your Honor. Scott Baena on behalf of the Property Damage Claimants Committee.

MR. HURFORD: Good morning, Your Honor. Mark Hurford for the ACC.

THE COURT: Pardon me. I'm sorry, pardon me, but can the Court Call operator - I'm getting some people talking on the phone.

TELEPHONE OPERATOR: Okay.

THE COURT: Thank you. I'm sorry, go ahead.

MR. HURFORD: Good morning, Your Honor. Mark Hurford for the ACC.

MR. SAKALO: Good morning, Your Honor. Jay Sakalo

for the Property Damage Committee.

THE COURT: Anyone else? Okay, thank you. Ms. Baer?

MS. BAER: Good morning, Your Honor. The first six items on the agenda all have orders, and I'll just hand them up now and go through them one at a time.

THE COURT: All right. Thank you.

MS. BAER: Your Honor, the first item is the debtors' fifth omnibus objections to claims. There are four claims left. They're all environmental claims with a company called Weatherford. The parties are continuing to discuss potential resolutions, so we're continuing that to February 26th.

THE COURT: Okay, thank you.

MS. BAER: Agenda item number 2 is the debtors' eighteenth omnibus objection. On that one, Your Honor, there are two matters that are being continued to February 26th. All of the other relief has already been granted. Those two are environmental matters that we're trying to resolve.

THE COURT: All right.

MS. BAER: Item number 3 is the debtors' objection to the claim of Anton Volovsek. That matter at Mr. Volovsek's request we gave him additional time to respond until February 9th and continued the hearing on that objection to February 26th.

THE COURT: Okay.

MS. BAER: Item numbers 4 and 5 are the New Jersey matter and the New Jersey injunction. The parties actually have an in-person meeting for later in February. The matter's being continued to February 26th.

THE COURT: Okay.

MS. BAER: Item number 6, Your Honor, is the debtors' twentieth omnibus objection to claims. This is the first time that this matter has come up. Your Honor, the order that we have presented provides for various relief. The claims on Exhibit A, there were no responses filed nor objections filed. Those are either no liability or insufficient documentation. They're being expunged and disallowed. The matters on Exhibit B are being reduced and allowed or reclassified, reduced, and allowed. The claim on Exhibit C is being reclassified but not allowed, and the rest of the claims listed on Exhibit D, we did receive responses or contact from the claimants, and they've asked that those matters be continued to February 26th.

THE COURT: Okay.

MS. BAER: Your Honor, item number 7 is the continued application of Caplin & Drysdale for fees. There was a contested matter last time, and I believe that on the telephone are Mr. Smith and counsel for Caplin who are going to address that issue.

THE COURT: All right, Mr. Smith.

MR. SMITH (TELEPHONIC): Yes, Your Honor. As the Court may recall, at the last fee application hearing, we had challenged some time entries by paralegals for Caplin. They were essentially for filing and for Pacer - for going on line and retrieving documents from Pacer. We've been consistent, Your Honor, in recommending such time entries be compensated at $80 an hour feeling that those kind of tasks, even when performed by a paralegal or indeed a lawyer should be compensated at a certain rate appropriate for those tasks. We cite Vicky Deever (phonetical), Your Honor, to the effect that the type of service being performed affects the rate of compensation, not wether it is compensable at all. Again, Your Honor, we've been consistent in suggesting that these types of tasks be compensated at this rate. At the last hearing, it was suggested by the Court that Caplin provide us further information regarding these time entries. We haven't received any further information, Your Honor.

MS. TOBIN (TELEPHONIC): Your Honor, excuse me. This is Rita Tobin. Not only did we send further information to Mr. Smith, but my office called Mr. Bowsay (phonetical) yesterday to ask why we had not gotten a response to our further submission, and Mr. Bowsay assured my paralegal, Andrew Capswilson (phonetical) that the information has been received and forwarded on to Mr. Smith. So I think there may

be a communication problem here.

THE COURT: I guess there is.

MR. SMITH (TELEPHONIC): Well, I guess there is, Your Honor.

MS. TOBIN (TELEPHONIC): We e-mailed Mr. Bowsay and then followed up with a telephone call, and we had not heard from him, and I know Mr. Capswilson told me he spoke to him directly.

THE COURT: Okay, what's the nature of the additional information, Ms. Tobin?

MS. TOBIN (TELEPHONIC): Yes, we handed - submitted a spreadsheet. Mr. Smith's time from each time entry from April 6th, 2006 through June 30th, 2006, and in each case Mr. Smith further explained the task that he had performed, so - David Smith, excuse me. So that Warren Smith could review them and decide whether or not he felt it met with the criteria that he was arguing should be met before we could be paid in full. So there were more detailed time entries submitted, and I don't know what happened and why they fell through the cracks.

MR. SMITH (TELEPHONIC): And I don't know either, Your Honor. I talked with Mr. Bowsay this morning about this matter and didn't receive any further information.

MS. TOBIN (TELEPHONIC): This is very odd because this was - Also I'll explain to Mr. Smith, this was e-mailed

well over a week ago because I was leaving on vacation, and I made sure that it got out before I left. I am not in the office now, but I will have to check back with Mr. Capswilson, and I believe there's some e-mail correspondence from yesterday that we can look at to try to straighten this out.

THE COURT: Okay. Is there another Grace hearing coming up before the next omnibus?

MS. BAER: Not currently.

THE COURT: No? Why don't you two see if you can get this resolved and submit something on a COC rather than having to put this over another month, but if you can't, then I guess under these circumstances, I don't really have much choice to put it over yet another month.

MR. SMITH (TELEPHONIC): Your Honor, we will dig up that information wherever it may be, and we'll look at it; okay?

MS. TOBIN (TELEPHONIC): And I will check back with my office and find out what we have from yesterday that we can forward to Mr. Smith to assist him.

MR. SMITH (TELEPHONIC): Your Honor, we apologize for this mis-communication.

THE COURT: Okay, well, it happens from time to time, but if you can get it resolved, I think that would probably save everybody a little bit of time, so, I'll -

MR. SMITH (TELEPHONIC): Yes, Your Honor.

THE COURT: - rely on you to do your best. Thank you.

MR. SMITH (TELEPHONIC): Could we be excused, Your Honor?

THE COURT: Are there any other fee matters in this case?

MS. BAER: No, Your Honor.

THE COURT: Okay, yes, thank you, Mr. Smith.

MR. SMITH (TELEPHONIC): Thank you, Your Honor.

MS. BAER: Your Honor, that takes us to agenda item number 8, and Mr. Bernick will address that.

THE COURT: Mr. Bernick?

MR. BERNICK: Good morning, Your Honor. I think that the way that we're going to proceed on this is to combine items 8 and 9, which essentially focus on the same subject matter, and the claimants are so anxious to proceed that they're going to argue first. We talked and they're prepared to argue first and I'll just respond.

THE COURT: All right.

MR. MALADY: Good morning, Your Honor.

THE COURT: Good morning.

MR. MALADY: Once again, Ray Malady for the FCR. Your Honor, I'll be addressing Grace's motion for a protective order and to quash the Rule 30(B)(6) deposition

notice of W.R. Grace & Company that was issued by the FCR and the ACC in combination. That notice was served on October 3, 2006. We've had some discussions with the debtor's counsel. I would like to provide some background for the Court and for those in attendance at the hearing and listening on the phone as to how we got to the place where we are today because we have narrowed the issues for discussion somewhat. We provided the debtors' counsel with a demonstrative, Your Honor, that I'd like to hand up to the Court. We don't have any viewing equipment in the courtroom today so I'll have to ask the Court to bear with me on this, but -

MR. BERNICK: Yeah, I don't have a problem with that document being tendered, if the purpose is to go through all of the other items in the 30(B)(6) that are not going to be presented for decision today. I'd have to confess to Your Honor, I'm not the one who negotiated this with Mr. Malady, and I'm not familiar with the details of that negotiation -

MR. MALADY: That's not the purpose of it.

MR. BERNICK: Well, that's fine, then I'm not sure what the purpose is but go ahead.

THE COURT: Thanks.

MR. MALADY: Your Honor, I should begin by stating that the FCR and the ACC believe that the debtors' motion to quash and for protective order should be denied and would remind the Court that the debtors bear the burden on that

motion, and as we'll go through the arguments, they have other burdens on this motion as well including the burden to establish that any of the information requested is privileged attorney work product or privileged attorney/client communication. On this demonstrative as you can see, Your Honor, although Grace objected to every topic on the 30(B)(6) notice, we have engaged the debtors in a discussion about what topics would be suitable for 30(B)(6) inquiry, and I just want to go through what we've accomplished to get to the point where today we are only dealing with topic number 1, which is Grace's pre- and post-petition asbestos tort claim estimates. Topics 2 to 6 - these deal with Grace's pre-petition settlements and here, as the Court will recall from the December 5 hearing, we have agreed and worked out a stipulation with the debtors to depose Grace's present and former in-house counsel, Messrs. Beaver, Segal, and Hughes (phonetical), in their individual capacities while reserving our right to seek 30(B)(6) testimony if complete discovery on these topics is not forthcoming. Those depositions are now scheduled to take place next month, and by agreement, the debtors and the Committee are asking this Court today to defer Grace's motion to quash on topics 2 through 6. Topics 7 through 10, these deal with Grace's asbestos-containing products. Here we've dropped our request for a deponent and are accepting the alternative discovery that the debtors have

provided. Which takes us to topic 11, and this addresses Grace's CNS claims database. As with topics 2 through 6, the parties by agreement are asking the Court to defer ruling on Grace's motion to quash. Counsel had represented - Debtors' counsel have represented to us that Mr. Hughes will testify concerning Grace's knowledge of the CNS database which is topic 11, subject to the understanding that he will not address any analysis of that database by Grace's testifying experts, and we're fine with that. Which brings us back to number 1, and, as you can see from the demonstrative, Your Honor, you see what we want Grace to prepare a witness to tell us about there on the left side. Their objections are listed in the center, and the discovery they've offered in lieu of a 30(B)(6) deponent is indicated in the block on the right. Now, there's a lot here, so I think it's worth spending a few minutes to just unpack this and make for an easier discussion as we go through this, and what I've done, again, with the hope that it might assist the Court is just make a few notes on the whiteboard. Can Your Honor see this?

THE COURT: Yes, I can.

MR. MALADY: This is a test of my eyesight, but we'll see if we can read it from back here. What I've written on here, Your Honor, is - and for those listening by phone, it's just a note that is labeled, 30(B)(6) Estimates, and I've got three things on the left and then some things on

the right. And what I've tried to do here, Your Honor, is really outline the issues for the Court. Why is this discovery relevant? That's issue number one on the left. Why isn't it cumulative? In other words, why hasn't the discovery that Grace has already provided, why isn't that sufficient to give us the discovery we need? Why do we need to take a deposition of the 30(B)(6) deponent? And lastly, is this information privileged such that no matter how relevant, whether or not cumulative or burdensome or anything else, we're even entitled to have this discovery or is it protected by applicable privileges? . . . (microphone not recording).

THE COURT: Oh, okay, do you need a little pell-mike, Mr. Malady? There's the little pell-mike if you need to get closer.

MR. MALADY: (Microphone not recording.)

THE COURT: I did too.

MR. MALADY: You are the expert at this, David. I want to say that after further review the play stands as called on the field. In any case, okay, Why is this relevant? And how will it be not only relevant but helpful to the Court in the estimation proceeding? And we submit it's important in three significant ways, which I've indicated to the right of the why-relevant question on the board. Methodology, Dalbert, and impeachment. Methodology -

What is that about? This Court, as Your Honor is well aware, needs to settle on an appropriate methodology to assess the amount of Grace's current and future asbestos tort claim liability. Now you'll hear experts on our side who will base their estimates on Grace's claims and settlement history combined with actuarially based projections of future claims which will be tied to the nationwide incidents of asbestos-related diseases.

THE COURT: Actually, Mr. Malady, I can't hear you now. Your voice is going in and out with that microphone. So, if -

MR. MALADY: I'm going to tender this back.

THE COURT: The Court has to settle on one methodology and that's - I'm not sure.

MR. MALADY: Right. You didn't lose the point, thank you, Your Honor.

THE COURT: Okay.

MR. MALADY: And this is the approach that all courts - the approach that we're using is the approach that all courts that render estimation decisions in asbestos bankruptcy cases have recognized and adopted, and those courts, as the Court is well aware, are the Armstrong, Owens Corning, Federal Mogul, and Eagle Pitcher Courts. Now, this is also the approach that Grace used to estimate its aggregate liability, for SEC reporting, and internal

financial planning purposes. In its most recently available 10k, Grace says that it calculated the estimated asbestos liability it disclosed to the SEC and the quote, "Funding Amount", end quote, in its proposed plan of reorganization based on the same actuarially based estimates of its liability for pending and future asbestos claims. Now Grace advocates a different estimation methodology in its estimation proceeding. A questionnaire-based approach that is unorthodox, unaccepted, not tested by any court. Now we highly suspect, although we don't know for sure until we have the debtors' estimation report, that Grace's created-for-litigation methodology will repudiate, to some extent, the methodology that Grace used in its SEC reporting both pre- and post-petition and also in its financial planning and in developing its plan of reorganization. We think there will be an inconsistency there. Now, Grace understandably would like to hide its post-petition estimation methodology from the Court and the Committees. It doesn't want to be forced to concede that it liked the Committees' methodology and approach just fine, and was comfortable with using that approach until it realized that when applied to the facts in this it would not protect equity, and a different approach was needed. So Grace's use of a different methodology then that which is advocated here in this estimation proceeding is, we submit, a highly relevant issue on which - and which

of these methods is the proper method to choose may be the central issue in this estimation proceeding. So that's the relevance on methodology. Now, Dalbert; why have I put that there? Grace's use of a different methodology for this litigation then it has for financial planning and SEC disclosure purposes is relevant to the Court's Dalbert analysis of the reliability of the opinions of Grace's testifying expert. The Court is familiar with the Dalbert case. I won't go through all the factors, but the Supreme Court in Dalbert did recognize a number of factors pertinent to the reliability inquiry, including test-ability, peer review or publication, potential rate of error, existence of standards and controls, and general acceptance. The Third Circuit has adopted these and other factors relevant to reliability including, and this is the important one, whether the experts are proposing to testify about matters growing naturally and directly out of research they've conducted independently of litigation or whether they have developed their opinions expressly for purposes of testifying, and that's from the In Re: Eunice's Savings Plan litigation case in 1999, Third Circuit case which the Court can find at 173 F3d 145. Another useful case for the Court to look at is In Re: TMI Litigation Cases Consolidated II from the Middle District of Pennsylvania, which can be found at 911 F.Supp. 775. In that case the Court applied the Dalbert reliability

criteria to the testimony of an expert in meteorology, and this gentleman had developed a water plume model to perform dost estimates that had not been subjected to peer review. The Court found that to the extent the expert's analysis used standard techniques, in a standard manner that had been subjected to peer review, the reliability criteria was met. However, because he also testified that the treatise that he had prepared for the litigation had not been peer reviewed and that it deviated from standard methodology and appeared, as the Court said, to have been derived solely in connection with this litigation, that this factor, and the quote said, "Will weigh against the admission of his dost estimate testimony." So, the point here, Your Honor, is that in order for this Court to properly perform its gate-keeping function it should be able to assess whether the analysis Grace's expert will be advocating here has been peer reviewed, which we don't believe will be the case, or finds acceptance outside the courtroom, which we also don't believe will be the case. Knowing what the expert did for non-litigation purposes is highly relevant to this inquiry. Now, one of the purposes of our deposition is to find out exactly what was done outside the courtroom. Last relevancy item on the board here, impeachment. Why is impeachment relevant? Well, if it turns out that Grace's testifying expert on the estimation of the asbestos PI liability is the same person who performed

these actuarially based estimates used for Grace's financial planning purposes and SEC reporting purposes, and we think it is, and we think that happened, you know, he did that post-petition as well, the Committee should be able to impeach Grace's expert to the extent his opinions in this case deviate from his views in a non-litigation world. That is just fundamental to our adversary system that the Committees and the Court should have the ability to test the credibility of the debtor's expert opinions by reference to his prior work. So that's why this is relevant, Your Honor, and why we believe it will be useful to the Court in its gate-keeping function to permit this discovery to go forward. So let me now turn to the second question I presented for discussion which is, Why isn't this cumulative? The debtors have made much of the fact that they've provided discovery lists, various things, and in many cases, as I said at the outset of my remarks, we've accepted what they've provided in lieu of deposition but not on this topic one, and we don't think there's cumulative testimony here for various reasons, and here's where my writing get a little harder to read, but I've got three points to the right of the question, Why not cumulative? And let's go through these. The first is that the Sealed Air discovery, which is where Grace is referring us for this information, this is the Sealed Air fraudulent conveyance case that was litigated before this Court where

the ACC was a party, the FCR was not. Depositions were taken of the same gentleman that we are deposing next month, Messes. Beaver, Segal and Hughes, on some of these same topics. Why isn't that discovery sufficient? Why shouldn't we just be satisfied with those transcripts? Well, first of all, that discovery took place in 2002. It is 2007. That's five years since those transcripts were taken. The FCR was not a party there, that's why I have FCR with a circle around it and a line through it. And also, and perhaps more significantly, methodology was not an issue in the Sealed Air case. There was no contest about what methodology would be used to estimate Grace's asbestos tort claim liability. So - and why is that important? Well, you know, in Sealed Air there was no dispute about methodology, and so there wasn't any need to prob how these historical estimates were developed or how settlement litigation decisions were made, and what factors went into setting reserve amounts and reserve levels. All of those issues are central to the methodology battle before the Court here and which the Court must resolve. And the absence of our client to those proceedings is also important, Your Honor, because, I mean I'll just give the Court an example: When Mr. Beaver was deposed he spoke to the extent to which projections of future claims were done and how those were done, and some of that transcript is sealed. I don't want to go into it too much,

but suffice it to say that there are many questions that we would have asked in followup to the questions that the ACC put to Mr. Beaver that would go to the process that they used to get to an estimate of future claims, which is really the whole ball game as far as we're concerned in this case. So let me now turn to privilege. As I mentioned, the debtors have asserted both the attorney/client privilege and the attorney work product doctrine to bar this 30(B)(6) deposition of a designee on the estimates of its asbestos tort liability. Grace bears the burden of establishing the facts that demonstrate the existence of the attorney/client privilege or the work product privilege. It is their burden. They also must demonstrate or bear the burden on the issue of non-waiver. It's not our burden to demonstrate that Grace has waived the privilege. It is the reverse. On attorney/client privilege, it seems that Grace has only half-heartedly asserted that privilege in its papers. They've really made the thrust of their argument that this is protected work product. They really hang their hat on that, and I don't think I need to say too much about attorney/client except that I would like to refer the Court to the privilege log that Grace has provided to us. May I approach the bench?

THE COURT: Yes. Thank you.

MR. MALADY: And we think, Your Honor, this

privilege log really makes our case. What Grace has done here, as any good counsel would in listing out the - trying to make a claim of privilege, they've listed the documents by description, Bates range, date, author, recipient, cc, and type of privilege asserted. If we look at this, directing the Court's attention to the second entry, there's a document described as, D. Segal edits to memorandum in determination of et cetera, et cetera. The author of that document is not a lawyer. It's Robert Terola, who we understand to be the chief financial officer of Grace and a senior vice president as well, and that document's also cc'd to Grace's outside auditors, PricewaterhouseCoopers. The next document on this list right behind that is the same thing. It's another memorandum from Mr. Segal who is a lawyer - excuse me, it's not a memorandum from Mr. Segal. The author of the document is Mr. Terola, the CFO, a non-lawyer. The description of it is essentially the same as the prior document, and once again, it's copied to Grace's outside auditors. And then if the Court would turn the page and look at the third entry from the bottom on this privilege log, the Court will see that there's a document entitled, Preliminary Expert Estimates of Personal Injury Liability prepared at the request of and under the direction of counsel for formulation and defense of proposed plan of reorganization. The author of that document is ARPC, which is Grace's outside expert

consulting firm, which has been designated as a testifying expert in this case, and which also prepared Grace's pre-petition reserve estimates for the company, and that document is also cc'd to Mr. Terola, the chief financial officer of the company. So there are - This privilege log really points up a number of issues, waiver being one. The privilege is waived when documents are disclosed to outside auditors. There are reams of cases on that. I can provide some cites to the Court, but also just on whether the privilege attaches. There are some interesting observations about this log. The fact that -

THE COURT: How do we know it's disclosed to the outside auditors, I'm sorry? This says it's -

MR. MALADY: It's carbon copied to PricewaterhouseCoopers, LLP, the second document on the first page as well as the third document.

THE COURT: I'm sorry, I'm looking at the third document up on the - third line from the bottom on the second page.

MR. MALADY: That one was on, apparently.

THE COURT: Okay, so your claim as to this one is, Why is it not subject to some privilege?

MR. MALADY: This one, Your Honor, prepared by outside expert consultants, not for purposes of rendering legal advice or providing legal advice, cc'd to the CFO of

the company, certainly not work product protected, and this gets into, What is the predominant purpose for which this document is prepared? I'm about to go into that, and I don't see how it's attorney/client privileged.

THE COURT: If it goes to the CFO of a company?

MR. MALADY: No, not for that reason specifically, Your Honor, but it just doesn't appear to be a document that is being provided to Grace for the purpose of rendering legal advice or in response to -

THE COURT: Well, I mean, it seems if he's designated as a testifying witness you're going to get it as an expert report anyway as a testifying witness; aren't you?

MR. MALADY: I don't believe so, Your Honor, because this is a preliminary expert estimate, as described. We expect that we will get the final expert report of this witness.

THE COURT: Oh, oh, I see what you're saying.

MR. MALADY: This was done back in 2004. We suspect that the methodology that was used to prepare this report will be markedly different than the methodology being used for this case, and this again goes to what I was saying earlier about we think we need to see the work that was done by this firm outside the courtroom, outside the litigation environment and compare that to what they're doing for this litigation.

THE COURT: Well, okay. I think with respect to that issue, I think I need something from you that indicates why you're entitled to get preliminary expert estimates as opposed to final expert estimates. I mean, I'm just not aware of the fact that in discovery regardless when you get a testifying expert that you're entitled to that. If you are, then I think as part of the expert witness discovery you may get it, but I'm not sure how you're going to get it in what you're trying to do at this stage of this proceeding with respect to your fact discovery. It's a different issue.

MR. MALADY: Let me be clear. I probably was not clear enough on this, Your Honor, and let me try to make this clear. We are not seeking this document because we believe it to be a preliminary report done by the testifying expert, and we should be able to see it for that reason. In fact, we have an agreement that we're not exchanging anything but final reports in this case, and that's been reduced to a stipulation. So that's not the purpose of the request. This analysis appears to have been done for financial planning purposes, for SEC reporting purposes, and it's in connection with that exercise -

THE COURT: Well, that's not what the stated purpose of it is.

MR. MALADY: Well, Your Honor, there is an inextricably intertwined relationship here between what Grace

was doing to prepare its plan of reorganization and what it was reporting to its outside auditors, and we think we will be able to establish that. They were estimating their asbestos tort liability for a number of reasons, purposes. One was to prepare their plan of reorganization. A second was to report to the SEC -

THE COURT: Right.

MR. MALADY: - and third was to do internal financial planning.

THE COURT: I understand.

MR. MALADY: And the cases that we present to the Court in our briefs, in particular the Simon vs. G.D. Serle (phonetical) case, and another case which we have not cited, but which we discovered in preparation for this hearing out of the Southern District of New York, which I really would commend to the Court's reading, In Re: Pfizer, Inc. securities litigation, which is reported in Lexis 1993 U.S. District Lexis 18215 a 1993 case, and these cases are directly relevant because they speak to the distinction between the discovery of aggregate reserve calculations versus individual case reserve projections. The latter of course being protected work product because they disclosed the mental impressions and opinions of the lawyers in assessing the company's liability for a specific case and the latter, which are aggregate compilations based on gross data

and numbers, the disclosure of which would not signify or disclose any mental impressions of any lawyer. And so, the whole fundamental purpose behind work product protection, which is to protect the lawyers' opinions and processes, mental processes. None of that is undermined by the disclosure of aggregate reserve information.

THE COURT: Well, it may not with respect - It may not. I'm not making findings. I'm just articulating a point that I think comes up in some of the cases. It may not where, for example, the aggregate is prepared for some public reporting purpose such as for an SEC or reporting function, but that's not what the stated purpose of this document is. This says specifically, Prepared at the request of and under the direction of counsel for formulation in defense of the proposed plan of reorganization. There is nothing listed here with respect to SEC reporting purposes. If you can at some point substantiate through a witness that in fact this document was used for purposes of SEC reporting, then perhaps you've got a leg to stand on, but unless and until you've got something that goes around that stated purpose, I just don't think you're going that far with this document.

MR. MALADY: Understood, Your Honor. Well, here's how I think we would like to see the Court approach it, and the Court can make your own determination. We're not here specifically today to move to compel or have Grace produce

the documents on this privilege log.

THE COURT: Okay.

MR. MALADY: That's not the purpose of this. We would like - Okay, well the ACC does have a companion motion that seeks to compel this document, so I stand corrected. But in the context of the 30(B)(6) what we'd like to do is ask questions about the documents on this log if they have not been produced in response to the motion the ACC has filed. And, Your Honor, we also would submit that these documents can be reviewed by the Court in camera if it comes to that, but there's no question but that Grace, as part of its financial planning, used actuarially based estimates of its future personal injury litigation that were prepared by ARPC, and that's right out of Grace's financial statements given to the SEC. In Sealed Air as well, Your Honor, and this really goes to the issue of waiver, Grace was asked by the ACC whether it gave some of this information to its insurance companies. I have an excerpt from the testimony given in that case by Mr. Hughes, which is under seal, and with the Court's permission, I'll just hand it up to you. Do you have a copy for counsel?

THE COURT: Thank you. I'm sorry, this is so small I can't read it. I simply can't read it.

MR. MALADY: We'll see if we can provide the Court with a better copy and it certainly wasn't our intention that

the Court read it right now, but we would ask the Court to review that, if we can find a better copy of it, because it simply goes to whether the extent to which this type of information was provided to Grace's outside insurance carriers. Common sense would tell you that in determining the pricing for Grace's insurance, it's likely that Grace's insurers would have required Grace to hand over this kind of information as well as individual reserve information as well, and certainly aggregate reserve information. In this Pfizer case that I mentioned that the Court might want to take a look at, the District Court of New York rejected the attorney/client privilege claim on the fundamental ground, and I'm quoting here, "That disclosure to an insurer is not different than disclosure to an independent auditor. Both waive the attorney/client privilege." On the work product protection issue, as I've stated, Grace's liability reserves and estimates were prepared for SEC disclosure and internal financial planning purposes. That they happened to also be used to support Grace's plan of reorganization doesn't transform them into reports prepared in anticipation of litigation. Now, here's where it gets a little bit tricky, and you have to read these cases carefully to understand what they're saying because there are nuances. We are in the Third Circuit. The standard for determining whether something was or was not prepared in anticipation of

litigation in this circuit is right from the Wright & Miller treatise, and the test is whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. All right, so it's a highly fact specific, individually case-specific inquiry. Now, we've cited the G.D. Serle case from the 8th Circuit. The debtors have cited in response a District Court case, an opinion by a magistrate judge here in the Third Circuit in the Eastern District of Pennsylvania. And if you read their briefs, you almost get the sense that we're relying - the Committees are relying on an 8th Circuit standard that has no applicability here and the Court should follow the Runcolant (phonetical) which is that magistrate judge ruling from the Eastern District of Pennsylvania. But when you get into these opinions and read them, you see that the G.D. Serle opinion from the 8th Circuit is correct - not only correct but not inconsistent with the Third Circuit standard. The Serle court looked at the nature of the document and the factual situation in that case, and it concluded that Serle's aggregate reserves could not fairly be said to have been prepared in anticipation of litigation. They were prepared for business planning purposes. Runcolant, that case involves - that's discovery of aggregate reserve figures in an insurance coverage case. The Court

there found that the aggregate reserves would disclose the individual case reserves, individual case reserves calculated by the defendant's attorneys, and it's for that reason that discovery was not allowed. And if you'll look toward the end of that opinion, there are two things the Court pins its analysis on, two rationales given, and both, we submit, are inapplicable here. The first is, the Court said the aggregate reserve figures may give insight into the mental processes of the lawyers in setting specific case reserves, and second, in the Court's view, it was impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures. Well, neither is true here. In the case of its personal injury claims, Grace didn't prior to bankruptcy or even after bankruptcy estimate its aggregate liability by performing an individual case reserve estimate for each of its over 100,000 asbestos claims and then totaling that all up and having that serve as the aggregate number. They didn't do it that way. We know how they did it because we have the reports of ARPC that were produced in Sealed Air. We know they used this actuarially based estimate. They relied on gross figures. They made assumptions. They did essentially what we're going to be doing in the estimation case. So there's no chance that the disclosure of the aggregate reserve information that we're seeking here is going to disclose any privileged attorney

opinion work product. And so, for that reason, the Serle opinion and the Pfizer case are much closer here and in both of those cases, the Court analyzed it and said, You know what, we're just not going to be imperiling the mental impressions.

THE COURT: Mr. Malady, you need to move, because at 1 o'clock this afternoon or 1:30, I've got a class action fairness hearing and this case is over at 1:25. So, please, we've got to move. We've got to move. This case is over today at 1:25, so please, you've got to move along. Okay.

MR. MALADY: My last point is simply that Grace suffers no prejudice from disclosure of a process for setting aggregate reserves. The bankruptcy stay halted all the litigation in this matter. Grace's plan of reorganization does not contemplate that Grace will ever again have to defend asbestos cases. This may be why Grace has been unable to find authority in a bankruptcy case to protect the work product here, the so-called work product. All of its cases are in the non-bankruptcy world. Thank you, Your Honor.

THE COURT: Don't repeat anything, Mr. Finch, I understand these arguments. Move onto a new point.

MR. FINCH: I'm not going to repeat anything. I'm going to emphasize a couple of points -

THE COURT: Don't emphasize anything. Tell me new things.

MR. FINCH: - focusing - I'm going to provide the Court with some cites -

THE COURT: Okay.

MR. FINCH: - on the privileged and not-work product issues.

THE COURT: All right.

MR. FINCH: The Serle case, which we cite for the proposition that aggregate reserves are not privilege, and the reason that this document, my motion to compel these documents, the reason that it is discoverable is because Grace, in addition to creating those documents for whatever purpose they said on their privilege log, they used them for setting their SEC reserves, and under the Securities and Exchange Act, when you're a public company, you have to file audited financial statements, which means, almost certainly they had to give this report to their auditors, even though their privilege log doesn't say they did, and I think if it comes to an evidentiary hearing about that, we have to have an evidentiary hearing, but the long story short is they used this and relied on this for setting their SEC reserves. That is a classic business planning and non-litigation function. And the Third Circuit test is exactly the same as the Serle test.

THE COURT: Won't the witnesses tell you that though? I mean you're doing a 30(B)(6) witness deposition.

Won't your witnesses be able to tell you whether they -

MR. FINCH: We're not doing a 30(B)(6) witness on this topic, unless the Court orders Grace to do it, and we're not going to have the documents to do the 30(B)(6) deposition on this topic unless the Court orders Grace to do it related to their post-petition asbestos reserve.

THE COURT: But, one second. Isn't the appropriate place to test whether or not the documents were used for a non-litigation purpose, which is for the purpose of the public filings to find out from the witnesses who were involved in the preparation, which I take it to be the three deponents who are scheduled at this point to give their positions, to ask that question. And if in fact they are, then I think the case law would probably tend to support the fact that if there is either no privilege or that it's been waived.

MR. FINCH: Well, Your Honor, what we are concerned about is we've got David Segal's deposition on Valentine's Day, February 14th. If, for example, I started in asking him questions, Grace is probably not going to keep me from asking questions about their post-petition reserves because it was already discovered in Sealed Air. If I start going into, Okay, you've got this privilege log, Mr. Segal, that Grace has produced, and they're talking about this ARPC report, what did you do with that ARPC report? Did you rely on it in

any way for your SEC financial reporting? They're going to instruct the witness not to answer, I would anticipate and imagine. I would prefer not to come back here in March or April and tee this up. So I think that that's why we're asking for a motion to compel, both to get the documents in advance of the deposition and to have the witness prepared to testify on that topic.

THE COURT: Well, with respect to the testimony, it seems to me that asking a very, you know, simple question, Were these documents used for some purpose other than that which is listed on the privilege log? may be an appropriate question, and I'm not suggesting the question. I'm trying to get to whether or not in fact the documents were used for some public filing purpose. I don't see how there is a privilege that can be asserted for that question if in fact the documents were used for some public purpose. But a disclosure of the documents which would by itself disclose the nature of the documents that may be subject to a privilege before you can assert that in fact they were used for another purpose seems not proper.

MR. FINCH: Your Honor, I think we have established that the documents were used -

THE COURT: No, you have to at least with respect to this one that you just mentioned, the ARPC document, in 2004 that's listed specifically for purposes of having been

prepared at the request of and under the direction of counsel for purposes of plan of reorganization purposes.

MR. FINCH: Your Honor, I would refer the Court to Grace's financial statements, which we attached as Exhibit 1 to our response to the motion to quash the deposition subpoena.

THE COURT: Which year?

MR. FINCH: Which year? The year - fiscal year ended December 31st 2005.

THE COURT: Okay.

MR. FINCH: And it goes to the plan of reorganization and estimate of the SEC liability, and it talks about that the liability - This amount, which should be sufficient to fund over $2 billion in pending and future claims is based in part on Grace's evaluation of (1) existing but unresolved personal injury and property damage claims, and (2) actuarially based estimates of future personal injury claims.

THE COURT: Yes.

MR. FINCH: The only document that can be is this 2004 report by ARPC.

THE COURT: Well, that's an assumption you're making. I don't know if that's true or not.

MR. FINCH: Well, Grace has the burden to establish that the privilege applies, and I don't think this entry on

the privilege log cuts it. I would suggest, Your Honor, that you review the documents in camera and see if there is any work product or privilege protection to the ARPC actuarial study, and the cite that I would leave Your Honor is the Third Circuit controlling case law is In Re: Grand Jury Investigation which the Runcolant court cites, and the cite is 599 F2d 1224, and at page 1229, the Court says, "The test should be whether in light of the nature of the document and the factual situation in the particular case, the document can be fairly be said to have been prepared or obtained because of the prospect of litigation."

THE COURT: Yeah, but let me just assume, just for purposes of this discussion that this ARPC report looks very much like all the other ARPC reports that you already have, that are filed under seal. Just hypothetically, for purposes of discussion, and therefore, it is an actuarial study of sorts, that doesn't mean that there aren't other actuarial studies that may have been prepared even by the same company for purposes of use by the SEC and that this one is in fact only for use for the counsel's purposes in preparing the plan.

MR. FINCH: Well, the point is, Your Honor, we have asked for all of their documents which underlie their SEC reporting and reserves.

THE COURT: Okay.

MR. FINCH: And they haven't given us the document on - They haven't given us the document that is referenced in their 10k. The document that's referenced in their 10k is the actuarially based estimate of future claims. They haven't produced that. Instead they produced a privilege log, and they say, No, you don't get it unless you win your motion to compel. Therefore, that issue is squarely before the Court. Either they haven't given me the document, they haven't claimed privilege - I don't think that's what they're doing, or they've identified it on the privilege log, and that's a document on which they rely for purposes of estimating their liability for SEC reserve purposes, that's probably what went to their auditors, and therefore, I urge the Court to decide the motion to compel on the documents based on the record before it, or at a minimum, to review the actuary report referred to in their 10k and their estimate of the pending claims liability referred to in their 10k, and I defy you to find anything in there that reflects the legal advise from Grace's lawyers or their mental impressions about how they're going to defend particular cases or even cases in the aggregate. Those documents just don't look like that.

THE COURT: Okay, well, I think the first thing is for me to find out why, if Grace has produced no documents that support the 10k information, there are no documents that are being produced because the 10k itself says they rely on

documents. So, that's -

MR. FINCH: Yes, I suspect that these are the documents listed on the privilege log, but I'll turn the podium over to my esteemed colleague, Mr. Bernick, and he can answer the Court's question about that, but the point is, Your Honor, I think the documents are not protected by any privilege. They're clearly relevant. The Court should order them to be produced, and we should be able to use them in the depositions, and we should get a witness to tell us about them.

THE COURT: Mr. Bernick?

MR. BERNICK: At the risk of running into the same problem, if I could use the microphone and . . . (microphone not recording). I know Your Honor is as anxious as we are to get onto other business, but a lot of things have been said here where hope springs eternal, but the facts don't support the hope. I think an awful lot of this could have been simply avoided if folks read carefully what the 2005 10k actually says as opposed to what it is that they would hope that it says. We have estimates that were done prior to the Sealed Air transaction, and these were ARPC estimates, and it is a stunning non-secret that the ARPC in connection with these estimates used an actuarial method. What they're basically doing is actuarial. It's not litigation merits or anything. You're basically taking costs as a number over

time. You trying through actuarial means to project what those costs are going to be assuming that the company stays in the court system, and that is the assumption. The assumption - not only this stays in the tort system, but the assumption is that nothing changes. You get an actuarial model. It's actually run by people who are experts in mathematical modeling that simply says, Based upon the history, what do we expect the cost to be going forward. So these are done - some of these were produced in the Sealed Air litigation because of the issue of advice of counsel. This was a fraudulent conveyance case and where you have advice of counsel, that's a defense. So the counsel went out and got advice from a variety of sources including ARPC. So, in order to defend the fraudulent conveyance claim, some of the air piecing materials were produced and made available and it was all under seal. This was '98. Then fast forward to '01, which is the date - the petition date, and there were updates to the ARPC analysis prior to the company going into Chapter 11, and the updates were similar to the earlier versions. This section - that is these were not produced voluntarily. They were ordered to be produced by Judge Wolin, and Judge Wolin's order, which I believe we cite in our briefs, and if not, we'll furnish it to the Court, specifically says they were for use only in the litigation and there's no subject matter waiver. So, with respect to

all of these, care was taken that they would only be using that litigation, there was no waiver. All of these share the common denominators, as counsel well knows, because they've seen them, but they're pure actuarial models and they say right up at the front, we're just assuming that everything stays the same. The company's in the tort system, that its cost trends historically continue into the future, and we run the models, and out the answer comes. We now go to 2004, and between '01 and 2004, these models were not updated. So, what's going to happen in 2004 and then we'll deal with 2005 very briefly because it doesn't really add very much to the equation. Well a new analysis we know is done in 2004 because there is a log listing for the analysis in October of '04. So I'll just put this down here, and I'll actually make it lower because this analysis was a very different kind of analysis. But all that we know, based upon the record that is there, and it's very clear, is that this analysis was done at the direction of counsel and, as the log states, and as the affidavit from Mr. Shelness (phonetical) states, it was done for purposes of plan formulation and defense of the litigation in this case. And Your Honor will well recall that there was a very significant development that prompted all of this in 2004, which was that Judge Wolin was recused, and Your Honor said to us, You've got to go file a plan and you've got to be prepared to go basically litigate the merits

of what you want to litigate. So, with that injunction - in fact, I think our due date for that was the end of October, Your Honor gave that direction. It was in connection with that effort that for the first time since the company had been in a Chapter 11 there was a new ARPC analysis done working with our firm for purposes of complying with Your Honor's direction for what was going to happen in this case. The affidavit from Mr. Shelness, who is the general counsel now of Grace and was present at the time says specifically that this analysis was done for that purpose. If you take a look at the log, it's very interesting what they have told you and what they have not told you about this log. The log actually goes through and lists - if I can find the thing here - I've got it, thank you. Your Honor will see that it's not really in chronological order, but if you actually take a look at the first time there's some discussion, there's some log entries before October, and there's a log entry for October that's ARPC. It's October of 2004. It reads: "Preliminary expert estimates of personal injury liability prepared at the request of and under the direction of counsel for formulation and defense of proposed plan of reorganization." The recipients are Ellie Liebenstein, who's a partner of mine, and David Segal, who was then the general counsel. Mr. Tarola is a cc and there's no other recipient. So, this was a document that was done as it says, and as Mr.

Shelness has said, under oath and an affidavit, specifically for that purpose at this time in order to comply with what Your Honor directed be done. Now, what's very interesting there and just to understand, this is now an estimate for that purpose at this time. What happens thereafter, and this is all set out, actually it's known because it's been presented to Your Honor previously, is that there was a plan negotiation at this time, and you will recall that we actually got a 30 day - by agreement of everybody there was a 30-day extension of time because it looked like we might actually do a deal to resolve this case. After that concluded, after that process ended, we had taken a settlement position, so I'll call it a settlement position. And the settlement position was rejected, but because we had put it on the table, we put it in our new plan which ultimately was issued on 1/13 of '05. So instead of saying, Well, we said that this was our settlement position before, but we're now going to go back to ground zero in our plan. We incorporated in our plan of reorganization - proposed plan of reorganization the very settlement position that we had set out with the other side in order that we hoped we could still make progress. So the plan document simply incorporated the settlement position. Did the plan document say, Here is the estimate for personal injury liability? No. The settlement position that we took in the plan was way

different than what we would have said in the estimation process even at that point in time, and there's documentation of this that we'll see in just a minute, if they actually took a look at what the 10k says. This January 13, '05 document now tees up the question, which had been anticipated before, and that's why there are some entries that you see in the log before, Well, what do we now do for SEC reporting purposes? Do we go back and continue to use this old number here? Do we use the litigation and plan formulation estimate that was done more recently at the direction of and with the supervision of counsel, which was based still not on the available information which we're only now getting? It was based upon whatever information was available at the time. Do we use the settlement position that we took in the plan or do we do something else? It's a classic issue for in-house counsel to take up, and lo and behold - and for the financial officer to take up, and lo and behold, there are a bunch of documents where they're all talking about, Geez, what do we do now for SEC reporting purposes given all of these different options? What a shocking surprise. Now, the final answer to what ultimately takes place is in the 10k itself because the 10k itself comes out, you know, in the early part of the year following and basically in the March time frame. So, again, we've got privilege log entries in the early part of '05 that deal with all of this. But I want to turn to the

10k itself and in particular the 10k for the following year, which is more expansive on the same subject and go through it a little bit carefully because it is the ultimate answer to the question of what occurred, and I believe that it answers these questions in a definitive fashion. This is Exhibit B, and it's very, very careful, and we'll pick out what it says in relationship to the numbers I've just put -

THE COURT: What 10k are you looking at?

MR. BERNICK: This is the 10K for now '05 that came out in March of '06.

THE COURT: All right.

MR. BERNICK: And it's the one that counsel cited in saying, Geez, this is establishes that their 10k is a calculation, I think Mr. Malady says, contains the calculation that we're talking about. It doesn't. Here's what it says: "Treatment of asbestos litigation under plan of reorganization, under the plan of reorganization raises requests in that the Bankruptcy Court determine the aggregate dollar amount", dah, dah, dah, dah, "that must be funded on the effective date and related costs." We refer to this amount here as the funding amount. So, Your Honor is to determine the funding amount. It is a condition of confirmation of the plan of reorganization that the Bankruptcy Court shall conclude that the funding amount is not greater than 1.613 million or $1.6 billion. So what the

plan did that we filed on January 13 of '05 is to set 1.6 billion as a condition for confirmation. This then is what gets reported in the filing. So the decision that the company took in making this filing, with all these different options, was to say, Because we have no plan of reorganization out there, even though it may not be the estimate because we don't know what the estimate is, it reflects that ultimately we will stand by a deal that pays out up to $1.6 billion, which was the settlement position. So, the settlement position is out there in the negotiations. It's put into the plan of reorganization as a condition for confirmation, and then it makes its way into this filing that takes place in March of '05. In short, what was in the filing of March of '05 is the same thing as in the plan, is the same thing which is a settlement position expressed as a condition for confirmation. That's all that's there. And this document goes on to make it crystal clear for the eager reader. And we're all eagerly reading here. This says, This amount, which should be sufficient to fund over 2 billion in pending and future claims, is - it's not the calculation - is based in part on Grace's evaluation of. We then have the litany of existing but unresolved claims, actuarial based estimates, et cetera, et cetera. Does that mean - Does this list, because it says "actuarial based estimates" mean that the 1.6 number is the estimate? That's not what the document

says. It says completely something else. It says, It's the condition for confirmation. It is what we are prepared to pay in the plan. It does not say that it's the estimate. So when they say that we disclosed the estimate by making this SEC disclosure, they're just flat wrong. The estimate was far less. And how do we know that? Because the document goes on to say it. It says, The funding amount will be primarily a function of the estimated number of allowed property damage and personal injury claims in the amount payable per claim. So, this 1.6 is not simply PI. It's PD, traditional. It's ZAI. It's everything all built into one. It's just the total condition for confirmation number. It is not even a disclosure of any of the component estimates at all. What about the actual estimate? Well, this goes on to say, The primary function, et cetera, et cetera, through the estimation process Grace will seek to demonstrate that most claims should not be allowed because they fail to establish any material property damage, health impairment, or significant occupational exposure to asbestos from Grace's operations or products. That's our position. If the Bankruptcy Court agrees with Grace's position on the number of and the amounts to be paid in respect of allowed personal injury and property damage claims, that is if the Court believes that we have the better position, then Grace believes that the funding amount could be less than the $1.6

billion. Why? What was Grace saying? If you go along with what we believe the estimate to be, that is down here, it's lower than the 1.6. Certainly different from the 1.6. By the same token, if able counsel for the claimants are successful, this is what it goes on to say, conversely, et cetera, et cetera, if you go with their position, it's substantially higher, and we now come to the key sentence. Quote: "Therefore, due to the significant uncertainties of this process and asbestos litigation generally, Grace is not able to estimate a probable funding amount that would be accepted by the Bankruptcy Court." There is no estimate that appears or is disclosed in this document, period, end of statement. What are we doing then? So it goes on to say, just as I've indicated here, However, as Grace is willing to proceed with confirmation of the plan of reorganization with a funding amount of up to 1.6 billion, we're now including it and we're taking a reserve. Nothing could be any clearer. This is absolutely, perfectly clear. We're talking about a settlement position that wraps in all of the liabilities. It then gets incorporated into a plan because we want to keep moving with the negotiation process, and ultimately gets incorporated into a filed financial statement, not because it represents the estimate, but because it represents, as this document says, what it was that Grace was prepared to do. There is zero disclosure of the much lower ARPC estimate that

took place. There's no disclosure of the methodology. There's no disclosure of anything. All there is is the aggregate number. That was what the financial statement says. And the essence of their position is, Gee, because you committed to do, you did the right thing which is to take your settlement position and put in the plan document and put it in the financial filing - Aha, we now get to look at all of the work product that you've done in connection with this case. All these facts are out there in black and white. Now the law is very, very clear, and I'll be very brief on this. This product here is protected in three different ways. First, it's protected if it were created outside of bankruptcy because it would be clear work product. This is lawyer driven work product. In the Simon case you're talking about a management risk assessment that was done for business purposes. This was not a risk assessment that was done for business purposes because the risk was all there. The risk was long ago. This was an assessment done by counsel working with an expert for purposes of a litigation analysis. That's what it was. Simon has nothing to do with this case. So it is clear work product and attorney/client protected because it deals specifically with a matter that's in litigation. I don't believe that there is a single case that they have cited or that is out there and we have cited cases that are in our favor, I don't believe that there's a single case

that's out there that says a piece of internal attorney driven work product that deals with ongoing litigation is subject to disclosure as being non-work product when it was done and never disclosed and never actually disclosed in an SEC filing. This is plain and simple, this is my firm working with ARPC to aid us in complying with the Court's directions. It is about as square a work product as you can possibly imagine, and Simon has got nothing to do with this case. That was a risk assessment document that was done by management people with no involvement of outside counsel, and we've indicated to the Court the cases that we believe support our position. They're in the briefs, and I'm not going to go over them again here. Now, that's just the first protection. Second protection, this case is in bankruptcy and because it's in bankruptcy there are work product protections that are associated with the bankruptcy process. This is, after all, an estimate that's done of underlying liabilities for purposes of litigating and preparing a plan. And the case law is clear, it's the Celetex case, that deals exactly with this situation. Work product that is prepared in the course of a general bankruptcy case is protected from discovery as being work product. And then we come to the third thing, and the third thing has not been emphasized very much but it is key, and that is that there is an agreement in this case that actually governs the discover-ability of this

very material. Dr. Florence was with ARPC is in fact one of our experts. He will testify in this case. This is work product from his firm. We worked with him in 2004 in developing this alternative view of the world. So, he's our expert. Now there is an agreement that has been entered into, was negotiated with the futures claimants, with the asbestos claimants. It's called a stipulation regarding expert discovery, and we have attached it, I believe to our briefs, and what this contemplates is that nobody is going to get discovery of work product unless it is actually relied upon by the expert in connection with that expert's testimony, and that's exactly what it says. The following categories of data information or documents need not be disclosed by any party and are outside the scope of permissible discovery including deposition questions. Nothing could be clearer. Number one or Romanet I: Any notice or any notes or other writings taken or prepared by or for an expert witness in connection with this matter, including correspondence or memos to or from, and notes of such conversations with the expert's assistants, and/or clerical staff or support staff, one or more - it reads about as broad as you can possibly imagine - unless the expert witness is relying upon those memo, notes, or writings in connection with the expert opinions. Number 2: Draft reports, preliminary or interlineate calculations or

computations or other preliminary intermediate or draft materials prepared by or at the direction of the expert witness, which is exactly what this was because we don't yet have the data to do the final analysis. We're only getting it now. Romanet III: Any oral or written communication between an expert witness and the expert's assistant and/or clerical or support staff, et cetera, et cetera, unless the expert is relying on it. The whole idea was that discovery with respect to Dr. Florence and ARPC is being our expert, just like their experts, is constrained the materials that he actually relies upon in connection with his testimony in this case. The effect of what they're doing is to say, This stipulation is a nullity, is a nullity in this case. It doesn't read out an exception. This is not something that says, Well, we're therefore preserving privileges. This assumes. Ordinarily expert would be subjected to discovery on these things. It would all be discoverable. This assumes that it will otherwise be discoverable, and what we're saying is, by agreement, even if it would ordinarily be discoverable, it's not discoverable. There's no exception in here for, Well, what if your expert worked with you earlier in this matter? There's no exception here that says, Well, with respect to Dr. Florence, because of historical involvement, there's no exception here for any number of other things that might conceivably make this earlier work by

Dr. Florence discoverable.

THE COURT: You've got to move along.

MR. BERNICK: Yes. So, it's protected in three different ways. Indeed, Your Honor, using the four corners of this stipulation, which was entered into long after all of this took place, need not analyze anything further than the language of this stipulation. It is binding and if it applies by its language, it is a deal in this case, there's no law that says that it can be broken. I come back then to the question, finally, of need. Need and relevance are two different things. There's a lot of argument about relevance, and I think that that really is a way of saying, Oh, well, let me into the merits of this controversy and kind of air condition the Court with what they believe is this fundamental inconsistency that is not - but it doesn't make a difference if this material is relevant, if it's work product there has to be a need for getting this material. There's no need for getting this material. The fact that Dr. Florence has used actuarial methods is well known to the world, if they want to cross-examine him about it they can. The fact that actuarial estimates are commonly used, they may believe supports their position on Dalbert. They don't need this in order to get there. The reason that they want this is to be able to impeach. They want to be able to impeach Grace because they believe it's inconsistent even though we

disagree. They want to be able to use it to impeach Dr. Florence even though we believe it is totally consistent. They gave away their right, if they ever had a right, to use this for impeachment purposes. That's what the stipulation says, and they certainly never had a right to say that work product dissolves in the face of a desire for impeachment. That is not need under the rules for the discovery of work product. So we're talking about work product today that has never ever been disclosed, not disclosed, not in the public filings. We're talking about work product where every indicia of work product has been satisfied both through an affidavit and through the very documents that they're relying upon to make their arguments here. And they want to say, forget all of that, because we would like to impeach Dr. Florence. That's not the way the rules work. Now, I believe that we have more than satisfied with the affidavit, with the log, and with the 10k itself our predicates for saying, This is work product and it's not been waived. Mr. Segal will be produced for a deposition in February. If they want to ask Mr. Segal whether the ARPC analysis was prepared for the purposes that Mr. Shelness has already said in his affidavit it was prepared, that is, if they want to ask Mr. Segal who was then the general counsel whether Mr. Shelness is right in his affidavit, that is, what was the purpose for which the ARPC report and the ARPC analysis is prepared, we will not

instruct him not to answer that question, and they can ask Mr. Segal what the purpose of the ARPC analysis is, and I don't believe that that's necessary, but we're prepared to do it to get another person who was there at the time testifying under oath that the log as it reflects now is accurate. But beyond that, they have got no leg to stand on. That was simply confirmatory of what their own documents reflect.

THE COURT: Okay, I don't know who all of the people are who are listed on this log. Some of them are listed as counsel. I assume that as counsel they're affiliated one way or another with the debtor even though that's not disclosed. I just make that assumption. I take it that that's not an incorrect assumption to make. But I don't know who the other people are. Sometimes they're identified - audit, committee of the board. I can assume that's not a committee of the board, but I know Mr. Norris through representations of other matters before this Court, but I am not aware of each specific person on this list. So I don't have a way of identifying through all of the recipients and cc's whether these are all employees who would otherwise not cause some privilege to be waived by virtue of the fact that the documents were provided to those entities.

MR. BERNICK: Well, if you're asking is there anybody from outside the company and its board and counsel to the company, that is, are there any third-party non-lawyers -

THE COURT: Yes.

MR. BERNICK: The only one that I can see here is PricewaterhouseCoopers which is listed on the third and I guess it's Document 12, Document 18. Now it may be that there are others. I don't see them right here. They are all in-house people and most all of them are lawyers, but the only one that I can see is PricewaterhouseCoopers, and again, our position with respect to that is - Do you see what the date of that, that is November of 2004. That is actually before the plan was filed. It is after the plan gets filed that contains this number that ultimately the decision had to be made about what to do in the filings, and that, I believe, is after November. That continues on, you see entries in December, even into January of 2005, and all of those documents are documents that are internal documents. They're not documents that go to third parties. So we have that document that was disclosed to an auditor at that time. We clearly do not believe that that is a waiver. There's no indication that it actually - that it achieved any broader dissemination than to go to that one person, and -

THE COURT: Well, but how is that person within the privilege?

MR. BERNICK: Well, because you're talking - it would be a waiver if that person then went and disclosed it to somebody else, but you're talking about somebody who is an

auditor of the company. They work directly with the company. The auditors often see reserve information. You know, you can have a - If you have a reserve on your books and -

THE COURT: This is an outside auditor. Pricewaterhouse is not -

MR. BERNICK: Absolutely. If you have a reserve that's on - if you have to carry a number on your reserve that's a liability number, auditors all the time look at those numbers and ask what the basis for it is. If you have a waiver of the underlying work product and attorney/client privilege, every time the auditor looked at it, it would dissolve the protection that applies in all these cases that deal with the reserves. The fact that an outside person - one outside person or an outside organization that's working hand in glove with the company it sees something does not mean it is waived. There has to be some use made of that. There has to be some contemplation that it will become more public and more broadly disseminated. And then also, this did not take place before the plan came out, and it was ultimately the plan that contained the number, the 1.6 number. The plan that contained the number that ultimately was disclosed. What I'm concerned about, and I don't know as sit here today, Your Honor, I don't know whether this same document includes information that was taken from the ARPC report that was done a month earlier. The sequence is, you

have October, because Your Honor directed us to prepare the plan and to negotiate; October is when the ARPC analysis is done. You then get this interim period of time where there's discussion about what to do including those two documents. I don't know whether that discloses this or not. You then get the plan coming out with the 1.6 number, and then that ultimately was disclosed and between the plan number and the ultimate disclosure, I don't see any documents here that were shared with anybody outside the organization at all.

THE COURT: Well, I don't either except for those two, and it may be the same document, I can't tell. They have different Bates Stamp numbers, but, you know, just looking at this list, it's got the same caption, and it has the same disclosure. So, whether it's the same document or a different document, two supplementals dated the same date, I don't know. But nonetheless, that - on this list, from looking just at the face of this list, those two documents, 12 and 18, appear to me to be the only two that would be suspect to possible disclosure.

MR. BERNICK: I understand that, and again, we have once more the question of the stipulation which says -

THE COURT: Well, this doesn't - I don't know is Mr. Tarola or Mr. Robert, who - are the authors, going to be experts?

MR. BERNICK: No, but that's not the point. If

those documents don't disclose the ARPC work, then the stipulation wouldn't apply.

THE COURT: Right.

MR. BERNICK: But if they do disclose the ARPC work, the stipulation does apply because Mr. Florence is ARPC, he's the one that did this, he's the one that's going to be testifying.

THE COURT: You need to take a look at these two documents, Mr. Bernick -

MR. BERNICK: We'll take a look.

THE COURT: - and see what's going on with them, because it appears to me that they may be subject to disclosure.

MR. BERNICK: Well, we'll take a look, and we'll also see if there's some way - We'll take a look at the documents, Your Honor, but at the end of the day, again, to the extent that it reflects the ARPC analysis, the stipulation then would apply no matter whether these documents were in the New York Times.

THE COURT: Well, I don't know. There may be some redacted version. I mean, you'll have to - you need to take a look at those two documents.

MR. BERNICK: I'll take a look at them.

THE COURT: Okay. With respect to the privilege log, it appears to me, with the affidavits with the list here

with the non-disclosure to anyone other than attorneys and in-house employees who would be assisting the debtor and with the specification -

MR. FINCH: Your Honor, may I be heard?

THE COURT: All right, just a minute. Not all of these documents, however, deal with the plan. There's another one. On the top of page 2, number 48, the second line down, which is dated back in 2000 which is clearly a pre-petition date.

MR. BERNICK: Yeah, it is a pre-petition date but that doesn't mean that it's discovery.

THE COURT: Well, I don't even know what it is. It doesn't have an author. It doesn't have a recipient. It simply says attorney work product, but I don't know for what purpose. So that one -

MR. BERNICK: We'll supplement that description, Your Honor.

THE COURT: Yeah, I think you need to because otherwise that one needs to be disclosed. It doesn't - There's no support whatsoever for the fact that there's a privilege claim as to that. Nor does the time period support one.

MR. BERNICK: Well, it's pre-petition, end of the year. It could well be again an analysis that relates to, you know, liability. I just don't know, but we will

certainly take a look at that.

THE COURT: The rest of these documents all appear - Okay, no, they don't. If you take a look at the next one down, 87, and then there are a number of them after this that have the same description. Memorandum re: Quarterly legal reserves meaning discussing claims against Grace including asbestos PI once PD claim's filed in Chapter 11. I'm not really sure what that means, frankly, but who are Joy and Michelle?

MR. BERNICK: Michelle Joy.

THE COURT: Oh, okay. Who is Michelle Joy?

MR. BERNICK: We'll supply the information with respect to those. I believe that the representation that I made concerning outside people, that is the only outside person here, is the Pricewaterhouse person and outside with counsel either to the Board or to the company is accurate, and, for that matter, most of the people in-house who are listed here, are also lawyers, although not - obviously Mr. Tarola is not a lawyer.

THE COURT: Well, I'm not - the privilege log simply, I think, is insufficient to permit that assessment. I really don't know what the description means. I mean, I can figure out some of the words but meeting discussing claims against Grace including asbestos PI once PD claims are filed in the Chapter 11? I mean, the description doesn't

mean anything to me.

MR. BERNICK: Yeah, we'll work on that.

THE COURT: So I don't know whether - is it a memorandum prepared for discussion with counsel? Is it for financial reserve purposes?

MR. BERNICK: We will eliminate that ambiguity.

THE COURT: All right, Mr. Finch.

MR. FINCH: Your Honor, may I suggest that the Court review all of these documents in camera and make an assessment as to whether they reveal any work product or not. We are going to trial in June in this case. The deadlines are very tight. Every reserve case that Grace cited, the Court ultimately reviewed the documents in camera, and Your Honor can decide whether a document discloses attorney work product or not.

THE COURT: All right, I will review them all in camera after I get a supplemental list that tells me who these people are and what position they have within the company so that - and a better description so I know what this -

MR. FINCH: May I ask the Court to set a deadline for producing the documents for in camera review?

THE COURT: Yes.

MR. BERNICK: I'm sorry, I'm sorry, Your Honor. An in camera review of these documents is not necessarily

completely indicative of what the documents are about. We have a situation to compel in camera review. We've got a lot of documents here where all you'll see are numbers and assumptions, and you won't necessarily know where in the world those assumptions came from.

THE COURT: Well, if that's the case then I guess that's what I'll have to say. I mean, the problem, Mr. Bernick, is, at the moment, unless you want me to simply say that this privilege log is inadequate, and therefore they have to be disclosed, I can't tell what these are. I mean this says, there's a memorandum to the file prepared by an unidentified person who claims an attorney work product. I don't even know if the person who prepared it is an attorney let alone if it's prepared under the auspices of an attorney, and I don't know for what purpose.

MR. BERNICK: Well, Your Honor, this is - Take for an example, anyone of these things, take for example the 11/13/04 document that Your Honor indicated. This is an absolutely traditional privilege log. It states what the purpose was. It states who got it -

THE COURT: Wait, I'm sorry, which one are you looking at?

MR. BERNICK: The third one on the list, the one that you were talking about.

THE COURT: The memorandum re: Quarterly legal

reserves?

MR. BERNICK: Right.

THE COURT: What's a legal reserve?

MR. BERNICK: Your Honor, a privilege log does not typically contain any more information than what you see here. If you wanted to get an explanation of what the reserve was in more detail, then the typical recourse would be to ask for an affidavit or perhaps ask for testimony that relates to the log. The typical recourse is not conduct an in camera review -

THE COURT: Fine, you may have a deposition with respect to what this log means, and then -

MR. BERNICK: I'm happy to have a deposition with respect to what the log means, and Mr. Segal will be the deponent who will testify as to what this log means.

THE COURT: And then if there is still some question as to whether there is a privilege, you may re-approach the Court with respect to that. You do not need to wait until the next omnibus hearing after the deposition. You may do it on an expedited basis.

MR. FINCH: And so we can, we don't have to re-brief the issues or re-tee it up.

THE COURT: You do not need to brief the issues again, but I do need to know some better articulation of what the issue will be.

MR. FINCH: I will just leave the Court with one thought. The accounting firm, PricewaterhouseCoopers, works for the shareholders and the creditors of the company. They have an independent duty to certify that the financial statements fairly present the financial position of the company, and they can't just say, Oh, well, this is Grace's litigation position in the bankruptcy, or it's settlement position. In our reply on this, we cited to the various accounting literature and attached a copy of Fast B-5 the financial accounting statement that says that when there is a contingent liability you have to do a reasonable estimate of the liability, and so Grace and its accounting firm were saying, This in our view - and telling their shareholders, not the people involved in this case. Think about all the people who are buying and selling Grace stock, in reliance on their financial statements.

MR. BERNICK: I object to all of this.

THE COURT: What's the point?

MR. FINCH: The point is, Your Honor, that once the - and this is the reason why the stipulation doesn't cover this, once they gave it to their outside accounting firm, once their accounting firm relied on it, and they relied on it as a reasonable minimum estimate of the liability in part on the ARPC study, then I submit to you there's no longer any work product protection. It's all squarely in the Serle and

therefore we're entitled to the document.

THE COURT: All right. I think I just asked Mr. Bernick to take a look at what this document is for that purpose. It appears to me that those two documents, whatever they are, because they have been disclosed to outside auditors may very well be subject not to the claim of privilege, but I believe that Mr. Bernick has a right to take a look at them to make sure that something isn't being missed, and to raise that issue.

MR. FINCH: Your Honor, I -

MR. BERNICK: Your Honor, I really object. We're now an hour and 45 minutes -

THE COURT: This is not my fault, folks, let's go. I've already made rulings. You can either continue to argue the point after my rulings or we can move on to something else.

MR. FINCH: Your Honor, if any other documents were disclosed to the auditors, may I get them as well.

MR. BERNICK: Your Honor, this is another request and I object to it. It's out of time and we've got to get on to other business.

THE COURT: This is the privilege log that I have. I'm not aware of any other documents. These are the documents on which you may take the deposition. Mr. Bernick, within one week you must examine these two documents and

either turn them over if they are not somehow subject to the expert ARPC issue that you have identified or supplement this list to explain why they are still subject to the privilege. Mr. Finch, you may approach the Court on an expedited basis with respect to those two documents. As to the other documents, you may take Mr. Segal's deposition. You may come back if there is some issue still remaining as to whether there is or is not a privilege left with respect to the documents. If there is some assertion of privilege that remains after Mr. Segal's deposition and you think that there is no privilege, you may come back, but I want in some better fashion an articulation of what the issue will be and what the document has been - what use has been made of the document as explained by the witness.

MR. FINCH: So if, for example, document 681 -

MR. BERNICK: Your Honor, this is not - this is not -

MR. FINCH: - the ARPC report was provided to PricewaterhouseCoopers, I can come back to the Court on an expedited basis.

MR. BERNICK: This is not appropriate. This is like the 10th request he's made for Your Honor to rule from the bench without going through what Your Honor has now ordered two different times -

THE COURT: I've ordered the deposition, Mr. Finch,

so that's it. That's what I've ordered.

MR. FINCH: Thank you, Your Honor.

MR. BERNICK: I believe, Your Honor, that there are a couple other housekeeping matters that relate to personal injury.

THE COURT: I don't think I've ruled on the deposition. Pardon me. With respect to the deposition request for a 30(B)(6) witness, is the ruling that I've made on the privilege log sufficient or is there some other issue that you need to be addressed?

MR. BERNICK: I believe the ruling on the privilege log is where Your Honor's coming out on the central issue with regard to privilege which is the issue that governs that first category. I think, I mean, from our point of view, Mr. Segal will testify about the log. If they believe that there's still some issue about whether it's privileged or not, these matters are privileged or not, they can come back before the Court.

THE COURT: I'm trying to find out from Mr. Malady whether I've covered everything by looking at the privilege log.

MR. MALADY: Thank you, Your Honor, and I did think that that question was posed to me. We do believe that the deposition is necessary if for no other reason than to ask -

THE COURT: Have I covered everything by looking at

the privilege log, is the question.

MR. MALADY: No, I don't believe so, Your Honor.

THE COURT: Okay, what am I missing?

MR. MALADY: Well, I think what you're missing are the questions that are raised by the very colloquy that Mr. Bernick had with the Court which he made some notes about on the easel over there, what was going on at various times; what was or was not encompassed within the report to the SEC; the extent to which these estimates were based on a settlement position.

THE COURT: Oh, you want to examine him about the 10k?

MR. MALADY: We want to examine him about Grace's estimates of its personal injury liability for asbestos claims and all the questions that were implicated by this colloquy are directly relevant, and we had a substantial need, we've demonstrated that -

THE COURT: With respect to what is incorporated within the 10k you may examine with respect to what is in the 10k. Mr. Bernick has just articulated the basis for the numbers that have been put into this 10k. What you may not do is go behind the purposes or the settlement discussions to the extent that settlement discussions are otherwise protected by Rule 408 or the other rules. But you may inquire whether - if you're looking for documents or other

witnesses, they exist with respect to the information that is in the public document un-10k. That is not leave to get behind the plan of reorganization issues which will come up in another time frame and for another purpose.

MR. MALADY: Are we -

MR. BERNICK: I take it - Excuse me. I take it that this again is now another request that's being made where there is zero, zero showing that there's some problem with Mr. Shelness's affidavit which otherwise would be in most courts dispositive. Be that as it may, when Your Honor says there can be examination of Mr. Segal, now, with respect to the 10k -

THE COURT: No, of the 30(B)(6) witness. They're asking to have a 30(B)(6) witness designated with respect to estimates that have gone into the debtor's preparation of its 10k, and I'm saying that to the extent that the debtor - to the extent that the debtor has relied on an actuarial study or studies for purposes of its 10k. You're saying they're going to say that it was the pre-petition estimates that were relied on, and they've got it, fine. If that's what the witnesses say, that's going to be a short deposition. To the extent that that's the answer to the question, that's the answer.

MR. BERNICK: Your Honor, no, that's not what we said.

THE COURT: You're saying among other things.

MR. BERNICK: No, that's not - again, that is not what we said. The 10k first of all speaks for itself. That is the only public document. We have no quarrel with the idea that if they want to take the person who will be our 30(B)(6) witness on this issue, which is Mr. Segal, and they want to ask him whether the matters that are set forth in the 10k are, as they appear in the 10k, if they want to ask him wether the 10k 1.6 number is in fact the estimate, they can ask them that question. What I want to protect is the work product, and I take it from what Your Honor has said, you've made no determination that says that they get access or can ask questions about the work product. Now, if what Your Honor is saying is, they can ask questions about the 10k and whatever that might entail including the basis for what's in the 10k, then Your Honor has just essentially said, they get access to the work product, and then we're going to have a lot of different proceedings because we're not prepared to waive that work product, and the stipulation specifically covers this work product because it's Mr. Florence's work product. So if they want to ask -

THE COURT: I am specifically finding that they cannot get Mr. Florence's work product because he is being designated as the testifying expert and is covered within the stipulation that was otherwise ordered. I am specifically

making that finding.

MR. BERNICK: I think that would probably - Again, we'll produce Mr. Segal to talk about the 10k, and he will be able to answer questions to the extent, for example, I say that the 1.6 comes from the plan as opposed to being from the - as opposed to being the estimate, comes from the plan, he can verify that.

THE COURT: Okay.

MR. MALADY: Right, and, Your Honor, we respect the Court's ruling obviously. Just for the record so it's clear, our view is that we are entitled to the actuarially based estimates that underlie that 10k for the reasons in our papers and additionally because we learned today for the first time from Mr. Bernick that the analysis performed for the 2004 exercise was, as he put it, a very different kind of analysis from what had been done previously that was discovered in Sealed Air and what is presumably going to be much different from the questionnaire based process.

MR. BERNICK: No, no. The characterization basically -

THE COURT: But it doesn't matter. He can't get it. It's a preliminary draft. If covered by the stipulation, he's not going to get it. It doesn't matter.

MR. MALADY: Thank you, Your Honor.

THE COURT: Okay. What's next? I will take - Are

you going to try to put an order together or is this record simply going to be -

MR. BERNICK: I think the record is more than adequate.

THE COURT: All right.

MR. BERNICK: With respect to the - there's a couple of housekeeping matters but there are some much, in fact of greater importance, that we take them up right now on personal injury, and I believe the balance of the agenda has really only two items which are both PD items. They are the pretrial conference with respect to the upcoming hearings, and also then what is essentially a status report or whatever else it is that Mr. Speights may want to take up for Mr. Runyan with respect to Anderson Memorial. I don't think that that should take too terribly long. The pretrial conference might take a little bit more time. With respect to personal injury, there are two different outstanding issues. One is the x-ray. Your Honor will recall that in the personal injury questionnaire, it stated our right to seek access to the x-rays. We then made a request to get all of the x-rays that were associated with non-mesothelioma malignant claims.

THE COURT: Let me back you up. What agenda item are we looking at?

MR. BERNICK: It is not an agenda item.

THE COURT: We do the agenda and then see if we have

time for anything else.

MR. BERNICK: I thought that we would accommodate Mr. Finch's request that we do it now. This is the most immediate problem that we face in this case right now, this and requests for more time to supplement questionnaires, so they really must be taken up today. They're more important in terms of the ongoing evolution in the case than anything that's going on right now.

THE COURT: All right, go ahead.

MR. BERNICK: Okay. With respect to the x-rays, we were assured that copies would be provided. That was their alternative to working with the originals. Your Honor picked up on that and entered an order that basically said, and this was after you indicated to us that you didn't want to talk about it anymore because it had already been resolved, that the order says, You've got to produce copies that are certified to be as good as the originals. And that if that was not possible, that would be an exception, not the rule, and then arrangements could be made to get access to the originals. We now have heard on the appointed date from 37 different law firms who have said, Oh, well, we can't give you those copies so we're going to make the originals available in our offices. That's 37 different law firms in 19 different states. So as we sit here today, what's now happened was we have gone back to the idea after all of the

originals but they haven't solved the problem which is making the originals available on a basis that provides realistic access. And today, we're not getting the x-rays. And by the end of the month, which is when they were all supposed to be provided, we are not getting the x-rays. So, we're in a situation where we have to come back and say that the only alternative is relatively simple, which is the - And they can choose a location. Let them choose whatever location they want so that they can have, quote, "custody through the agent that is in charge of that location." It will not be our facility. It will be somebody else's facility. Anybody who is not going to give us the copies or give us the originals, needs to put the originals into that office, that law office, or whatever it's going to be. It has to take place no later than February 15 because otherwise we can't get it done. We want them to be there for 30 days, and what we will do is we will bring in our three different reading experts at that location so that it's the plaintiff's control. There has to be privacy and all the rest of that, to review any remaining x-rays. Otherwise, we're just not going to get it done. So, that would be our proposal rather than going around to 39 different - 37 different law firms in 19 different states.

THE COURT: Wait. At the request of the law firms, we said copies could be made, and now the law firms are saying, No, we can't make the copies even though they said

they'd make them?

UNIDENTIFIED SPEAKER: (Microphone not recording.)

MR. BERNICK: Excuse me, excuse me. You said that the copies had to be certified as being sufficient.

THE COURT: Right.

MR. BERNICK: And now they're saying, No, we can't do that. It's not possible or feasible to do that, so we're going to make the originals available but they're making them available in all their different offices all over the country, and that is not workable. We're satisfied with the certification. We're satisfied with making all of the x-rays available as originals, but at a location so our experts can come there. So, it's one way or the other. They're either going to give us the certification or they pick somebody's office, they get them all there by February 15, we'll review them all in the next 30 days, and we'll be done.

THE COURT: Right.

MR. BERNICK: That's issue one.

MR. FINCH: Your Honor, may I respond. Is Mr. Esserman on the phone?

THE COURT: Mr. Esserman?

MR. ESSERMAN (TELEPHONIC): Yes, I am.

MR. FINCH: First, as a process point, this is an attempt to -

MR. ESSERMAN (TELEPHONIC): Yes, I am, Nate. This

is Sandy Esserman.

THE COURT: Mr. Esserman, Mr. Finch wants to ask you a question if you can hear him?

MR. ESSERMAN (TELEPHONIC): Yes, I can.

THE COURT: Okay.

MR. FINCH: First I want to address the Court and then I'll turn the floor over to Mr. Esserman and Ms. Ramsey. This as a point of process, Grace is attempting to reargue something that the Court ruled upon last month on an expedited basis, and the order was heavily litigated, and it basically came out that people could produce originals to Grace, but if they could produce copies to Grace, if they had an appropriate medical person who could certify that the copy is as good as an original, or they could make the originals available in their offices. That is what the Federal Rules of Civil Procedure provide. There is no provision in the Federal Rules of Civil Procedure that says you have to take your original documents and give it to somebody else, and I don't think that that is appropriate or the Court has the power to do that, particularly when there's not even a motion that's been filed that affects all these firms. Many of the firms have - upon inquiry of the x-rays, and I've seen some of the correspondence, they said, We've attempted to get certification. We can't do it. It's not reasonable. It's not reasonably practical or possible. The x-rays are

available at our offices, come and look at them within, you know, at your convenience over the next 30 days. Some of them they said, We don't have the x-rays. The hospital has them. We will get them back from the hospital. We have correspondence out to the hospital. This was a heavily litigated order. There were several hearings on this. Mr. Esserman and Mr. Ramsey addressed this, and I think it's a point of process. It's improper for Mr. Bernick to raise the issue now at a quote - it's not even on the agenda. It's just something he brought up out of thin air with no notice to anybody, no attempt to file papers. It's completely contrary to the Court's earlier ruling, and therefore, I suggest it's highly improper. You should just deny the request out of hand, and I'll turn the floor over to Ms. Ramsey and Mr. Esserman.

THE COURT: Okay. What is the issue about getting the certification. Is it some impossibility for some reason, Ms. Ramsey?

MS. RAMSEY: Yes, Your Honor. There are various reasons for the impossibility to get a certification. In some instances what the law firms have in their possession are copies, and what the law firms have said is, We're unable to certify this. We have no reason to believe that it's not a true and correct original. We believe in fact that it is a true and correct original, but we can't certify that it's

exactly like the original because we don't have the original here so that we can make that side-by-side comparison. In some instances, some of the firms have said, We don't have the capability, the special education that it would need to make that certification, however, they've made the same kinds of statements. We have no reason to believe it's not, and we in fact believe that it is.

THE COURT: And that's not acceptable to the debtor?

MR. BERNICK: As Your Honor said, under almost identical circumstances before the order was entered, was, because I raised exactly this issue, I said, Look, folks, this is really wasting my time. I'm sorry but I really have other things to do, as we have today. The copies of the things that are to be transmitted, the copies, unless the copies for some reason or another are not certified as accurate, you're not even going to get into this issue about the originals if you get the copies, so you're really wasting a lot of time. If somebody has a legitimate reason why an original can't be provided in lieu of a copy, they're going to give a certification. They're going to give you a certification, and if you have some challenge to it, then file a motion and we'll deal with it. You know, this process is supposed to be the exception -

THE COURT: Okay.

MR. BERNICK: - not the rule.

THE COURT: Yes. Fine, so file a motion. Mr. Bernick, really, I mean this process is getting out of hand. All of you are getting out of hand with it. If you've got a legitimate motion raise it. If you get an assertion from counsel that they don't have an original, and therefore, they can't certify something to be a copy of an original because they don't have an original, and you're not willing to accept that this is an accurate copy of the copy they have, then go look at the copy that's in the law firm.

MR. BERNICK: I'm sorry, that's not what - Your Honor, respectfully, and the only reason we're doing this now is the same pressure that we had before is that we don't - we have a situation where a representation was made to the Court in service of getting this order reading out a certain way and now it turns around and the net effect of where we are is that we're not getting what it is that we're supposed to be getting.

THE COURT: You're not getting it because they don't the originals.

MR. BERNICK: No -

THE COURT: If you're not willing to accept a certification that this is a true and accurate copy of what they have, then go look at what they have.

MR. BERNICK: I'm sorry, that is not -

THE COURT: Mr. Bernick, that's my ruling. Go look

at what they have in the possession of the law firms or else accept a certification. I don't have the -

MR. BERNICK: There's no certification, Your Honor. They haven't given us that.

THE COURT: Ms. Ramsey, can they make a certification that this is a true copy of what they have, and that they cannot get a copy of the original?

MS. RAMSEY: Your Honor, what the firms, and I'm not aware of all the 37 firms, but with the firms that I represent have said is, We are prepared to provide a certification that says exactly what I have related to the Court, depending upon the circumstances. If, you know, let us know if that certification is acceptable. If it's not then we're prepared to comply with the form of the order and make originals available to them, and we have not heard back in response to that correspondence.

MR. BERNICK: Your Honor, that may be Ms. Ramsey's situation. We have heard from 37 different law firms that say they are not prepared to give us the certification that Your Honor has just said you believe that they are prepared. That is why they are making the originals available at their offices in 37 different locations.

THE COURT: Then file a motion for sanctions, Mr. Bernick, file a motion.

MR. BERNICK: Yes, we will file a motion for

sanctions. Issue number 2 -

MR. ESSERMAN (TELEPHONIC): Your Honor, this is Sandy Esserman, before we go off issue number one.

THE COURT: Yes, sir.

MR. ESSERMAN (TELEPHONIC): Let me just address it quickly. The law firms that I represent have tried to get certifications as required under the court order for the copies. The general rule, they cannot get them. Some of them cannot get them and where the cannot get them the order's very clear. You're to make the originals available to the debtor at their offices, which they've done.

THE COURT: Mr. Esserman -

MR. ESSERMAN (TELEPHONIC): They've tried to make the certification and in some cases the hospitals won't give it. Some cases they've gotten a copy service to give it, and where they haven't given it, or haven't been able to get it, they made the originals available. I don't know how many of those 37 firms I represent, but we - all of my clients tried to get certifications first, and - which is what the order provided, and then barring that are making the originals available all pursuant to the order entered by the Court.

THE COURT: All right, Mr. Esserman, for those firms that have tried to get the certification, can they please notify the debtor the effort that was made and why they can't get it and see whether the debtor will accept whatever copy

can be provided.

MR. BERNICK: Your Honor, that is - Your Honor, yourself said very, very clearly, that in order to have this matter tried properly it is standard procedure they have the certifications so there's no issue about whether the copy is a true copy. If a copy is not certified to be a true copy, we are wasting our time because they will say it's not the same thing as what they saw in the original. Your Honor, they represented to you specifically that this -

THE COURT: Okay.

MR. BERNICK: - was the exception. It was on the basis of that representation that Your Honor entered the order and now it turns out it's not the exception it's the rule, 37 different firms in 19 places, and I'm sorry, there's nothing else that we can do except to do what is absolutely the most reasonable thing to do and it's not like - it's not in the rules. There are all kinds of cases where actual evidence, irreplaceable original evidence is put into a depository.

THE COURT: Mr. Bernick, that sounds like a reasonable solution to me. Apparently the other side thinks it's not, file a motion. That's what the process said, file a motion. I am not going to deal on a piecemeal basis in this case without motions. I have enough -

MR. BERNICK: Can we file it and have it heard -

THE COURT: - to do on the agenda.

MR. BERNICK: - on an expedited basis.

THE COURT: You can get it scheduled on an expedited basis, file a motion.

MR. BERNICK: Okay. Next issue that relates to the same basic problem is the questionnaires. Your Honor, I won't go through the long history of how long the questionnaires have been out there. People were supposed to answer them last January, then it got moved to July, then we had the question of supplementation, and Your Honor finally said, All supplements are to be done by January the 12th. We now have three different firms that have asked us for more time to do the supplementation, and they are - what is it, Foster & Sear, Angelos -

UNIDENTIFIED SPEAKER: (Microphone not recording.)

MR. BERNICK: And Hurley, yeah. This is now supplementation. It's not people who all of a sudden want to file new questionnaires, that was months ago. This is supplementation. We're prepared to agree to that extension for those firms to do their supplementation by the end of this month. I think they asked for 2 or 3 weeks. That is all we can do. We can't do any more. So we are agreeing now that those firms can do supplements, supplements only by the end of the month. Where this is going though is the point that I have to underscore to Your Honor, we have the x-rays,

which haven't been resolved. We have the questionnaire supplements that are still coming in, and, Your Honor, with due respect, there was a motion for reconsideration on the B-reads, and the result is, of course, that we're not going to be getting the B-reads. Now asked that Your Honor expedite the ruling on that. We filed an expedited response why the motion for reconsideration was not well taken.

THE COURT: I thought that was on today's agenda.

MR. BERNICK: No, I think that it's in the ordinary course, it would be on for the next time, but -

THE COURT: Well, I'm prepared. If everybody is here to address it today I'm prepared to address it because otherwise I'm going to be addressing it without an argument. I don't see a need for an argument on that one.

MR. BERNICK: Then I think Your Honor ought to simply - we're prepared - we need to get the order because we're falling way, way behind.

THE COURT: All right.

MR. BERNICK: And we're prepared to rest on the papers, we think the matter is clear. What all this adds up to, though, is that we're getting squeezed. We have the hearing in June. We've a pretrial order that anticipated that this material be available a long time ago, and what's happening now is, they're saying, Let's hold the date. Let's hold the whole pretrial order, but we're still not giving you

the information that's necessary for us to complete the preparation of the case. I'm just alerting the Court to this, that we will take up at the next omnibus - we'll make a proposal for shifting some of the pretrial dates so we can get now this data analyzed. This is the crunch time is to get the data analyzed and we still don't even have the data that we need. So I'm just alerting the Court to the fact that, you know, it's the b-reads, it's the x-rays, it's the questionnaire supplements. This is the essence of the case, and because we're not getting it in time, indeed, we don't even have agreement now to turn it over, and we have to file motions. It's going to have an impact on the pretrial schedule.

THE COURT: Okay, we're back to the - Mr. Esserman?

MR. ESSERMAN (TELEPHONIC): Yes, this is Sandy Esserman. I, of course, was not aware that any of these matters were going to be raised. They're certainly not on the agenda. I would like to talk first about the motion for routine consideration. We do think that it has been briefed in the papers, and there's just a couple of quick points in the motion, the thrust of the motion is that some law firms get clients in their door, sign attorney/client fee agreements with the client and then send the client for a consultation, which may not necessarily be to a doctor, but may be to a screening van. Some firms do business that way,

and just because it was a screening van, the doctor at the screening van doesn't necessarily make those x-rays discoverable. We think that that's clear. Also, some of the information that Your Honor has requested, in Texas is specifically not discoverable in proceedings in Texas, and we've asked for a protective order just to say that the information being provided here is to be used in the Grace proceedings only and can only be accessed by Grace and the Committees pursuant to Court order because that information specifically, for instance, any screening x-rays are not discoverable in Texas. That has to do with the motion for reconsideration. On the extension issue, our firm filed on behalf of two firms, one is the DeAngelos firm, and I think they asked for an extra two weeks, and they're trying to get all their questionnaires done. In fact, they will be supplementing today is what I understand. Both these motions were set on the Court's agenda for the next time, by the way. The other motion is the motion of Foster & Sear and they had requested more time then they had. I believe they requested four months, and the reason they had is because this once again is a small firm, and it's a small firm with a paralegal, and they're just working as hard as they can and they're - they told me they would be submitting the questionnaires on a rolling basis. I don't have the moving papers in front of me, so I cannot tell you how many

questionnaires they have to fill out, but the questionnaires are time consuming for the firm, and they're doing as best as they can. So, I don't know - I'm not saying material, but I imagine the number of additional questionnaires are somewhere in the neighborhood of five or six hundred, which certainly in the scheme of things, the scheme of the 100,000 or more questionnaires and claims cannot be material to the Grace case in any event. And I suspect that probably 90 or 89 percent of those claims are not malignant claims.

MR. BERNICK: Your Honor, with respect to what I heard Mr. Esserman say, we agreed with respect to the request that had been made to supplement the questionnaires by the end of the month, and if they're done earlier, that's fine. We are not agreeable to now what I hear Mr. Esserman saying, which is we're going to get whole new claimants in questionnaires. That deadline passed last July, and there's nothing that's happened. There's no request that's been made and it couldn't be made to now somehow now change the entire population of people that we're talking about.

MR. ESSERMAN (TELEPHONIC): I said supplements. I may have mis-spoken, David.

MR. BERNICK: Okay.

MR. ESSERMAN (TELEPHONIC): I don't have the motion in front of me but I think these are supplemental questionnaires -

MR. BERNICK: Again, we have no problem, Sandy, with the people who have submitted requests already, and I think - supplementing by the end of the month. With respect to the motion for reconsideration, Your Honor, you know, we laid it out. This is a motion for reconsideration. There are no new facts. There's no new law. This is now the fourth time that we've been through it, and essentially what they're asking is, that Your Honor gut the two paragraphs of your order that are actually the operative paragraphs. We think that Your Honor has heard this extensively, and that Your Honor should rule, and so that we can get on with finishing up the data gathering process.

THE COURT: All right, well, with respect to the motion for reconsideration, I'm not sure that I was aware - maybe I was and just simply missed it, but if I was aware I did miss it. The fact that some of the information that I was requiring may not be discoverable under some state provisions. And my intent has never been to make the use of the discovery that I'm ordering here available outside the proceedings except for use in this case including for some trust distribution procedures that may apply if this case gets through a plan confirmation process that has that type of procedure in place. So, I don't have any problem amending an order to provide that the discovery and the use of the documents and information to be provided is for the use of

the parties in this case and whatever, you know, subsequent proceedings may take place but in this case in this bankruptcy.

MR. BERNICK: I understand.

THE COURT: So, I don't have a problem with that. With respect to the issue as to how the law firms conduct their business, the motion for reconsideration asks me to amend the paragraph to say that the consultant privilege applies not just to the fact of an attorney retaining a consultant after there is an attorney/client privilege established but also substantially contemporaneously with an attorney/client privilege being substantiated. Frankly, I think that is simply - I think it's unlawful. I don't mean in a criminal sense, I just don't see how you can have a consultant privilege apply until you have an attorney/client privilege. You can't be consulting with respect to litigation until you have a client and know that you're intending to pursue some litigation. So you can't have a consultant privilege apply until you have an attorney/client privilege, and that can't be a substantially contemporaneous event. You have to have a client first. So, I am not going to make that amendment because I don't think, as a matter of law, that I can make that amendment. You have to have an attorney - you have to have a client that you can reasonably anticipate you're going to have a litigation for before you

can have a consultant to assist you with the litigation. So, I don't think that amendment is proper, and I'm not going to make it. I think the argument is somewhat circular. You know, the argument that's being made is that essentially anybody who walks in the door provides a lawyer with the anticipation of litigation. Well, I suppose because we're lawyers, we can always expect that somebody's going to anticipate litigation, but I don't think that's what the purpose of this privilege is all about. An attorney can't anticipate litigation until you have a client, therefore, I don't think you can have a consultation privilege without anticipating litigation, and you can't do that without knowing of the existence of a claim which would support litigation. So to the extent that a person may at some unspecified time in the future sue some unidentified entity on an unknown cause of action through an un-retained law firm, I don't think that that's enough to show that there is the possibility or anticipation of litigation sufficiently to support a consultative privilege. Therefore, I don't see a basis for the amendment that I'm being asked to make in that respect. I think there was one other -

MR. ESSERMAN (TELEPHONIC): There were two amendments, Your Honor. One was the one you just discussed. The other was after the formation there are some firms that do business specifically after a client comes in, the lawyer

sometimes will suggest a doctor for consulting privilege. In some instances, that doctor may be in connection with a screening van, and the question that I raised was your order was very broad in that basically any screening van review was not covered by a potential consultant privilege and the facts of that just would indicate a different result, I think, in those particular instances, excepting, of course, your first ruling on the contemporaneous issue, I understand that, but that was the - I don't want to say the primary thrust, but that was a thrust of the motion.

THE COURT: Okay, I didn't intend to say that all screenings are not subject to a consultive privilege, and I don't think the order is -

MR. BERNICK: No, it says differently. It is that - this is paragraph (5), However the Court finds that physicians, b-readers, or other medical professionals who first screen a claimant, that is prior to the time that any other diagnosis, dah, dah, dah, was sought or known are not consulting experts. Which says, that the first time you go into get a screening, the principal purpose of that screening is to find out if you're sick, and so then to say, Well, that really was only for consulting purposes, it's not for consulting purposes. It's to find out if you've got a diagnosable illness at all.

THE COURT: Right, that was the point. That was the

distinction I was trying to make. I think there's a difference between attempting to find a factual percipient witness as a diagnostic method to find out whether there is a claim that can be supportive of litigation at the outset, and a consultive privilege for the attorney to prepare for, anticipate, or whatever, consult with litigation secondarily, and I believe that the first i.e. diagnostic test that determines whether or not there is a - something, a disease, a symptom, a something that will in fact support as a medical condition precedent to a personal injury lawsuit which is what is being brought in these cases. These are personal injury actions that are the subject of the dispute. I want to make that clear, because that's the limit of my ruling, personal injury lawsuits, the limit of my ruling.

MR. BERNICK: Your Honor's language says, Or any other diagnostic of an asbestos-related disease or injury, that is the injury that is the basis for the allegation in the claim.

THE COURT: See, I think the problem is that at the time that you first consult the doctor, see the doctor, at that point you don't - the anticipation of litigation itself is contingent. It's not just the litigation that's contingent, it's the anticipation of litigation that's contingent, because you don't even know the underlying operative facts to determine whether or not you can

anticipate litigation. I don't see how you can have a consulting privilege that applies until you anticipate litigation. You can't anticipate litigation until you know the facts. You don't have the facts because you don't have the diagnosis. And that's the basis for my ruling. So, for those reasons, I don't see a basis to amend the order except to add the limitation with respect to the use that Mr. Esserman has required. So I do expect that the use is only for purposes of this case, and I will amend the order to that respect.

MR. BERNICK: We'll submit some language by agreement to Your Honor to do that.

THE COURT: All right.

MR. BERNICK: And I believe that that is all of the personal injury matters that we have, so we can turn to property damage.

THE COURT: All right, let me make a note, please, before we turn to that.

MR. FINCH: Your Honor, may Mr. Malady and I be excused?

THE COURT: As long as you're not interested in what else happens in the rest of this agenda.

MR. FINCH: Thank you, Your Honor.

THE COURT: But I don't want to hear later that you didn't know that something was coming up.

MR. FINCH: Well, may I have representation from Mr. Bernick that no other personal injury issues will be raised today?

THE COURT: I won't accept that representation even if he makes it.

MR. BERNICK: That being something that's not entirely within my control.

MR. FINCH: Thank you, Your Honor.

MR. MALADY: Thank you, Your Honor.

THE COURT: Okay, thank you, Mr. Restivo.

MR. RESTIVO: Good morning, Your Honor, or actually good afternoon, Your Honor. This will be a status report, Your Honor, on where we are on the remaining property damage claims and where we think we are going. I will be brief, but I would like to be complete on item 10 of the agenda. First, as Your Honor knows, the parties stipulated away the need for the dust methodology hearing that was set for January 29 to 31, and that's item number 13 on your agenda, and I don't believe any responses or oppositions were filed to that. Secondly, Your Honor, with respect to the May 30-31 no hazard hearing, expert reports were to be submitted by January 15. We have agreed with counsel for the claimants that we do not object to any late designations of Dr. Frank or Dr. Brody. There's some question whether or not Jack Hallowell (phonetical) is a late designation. If he is, we told him we

don't object to that either. Third, Your Honor, the debtor has agreed with Mr. Dies that he could have a little bit more time to list any testimony given by his experts over the last four years, which was a detail overlooked in his submissions. Fourth, Your Honor, we may want to file an expert report after January 15. We've asked the claimants to agree that we can do that, and we would give them the same 24 days to respond. I'd like to address that at the end of my report. Your Honor, I'd like to describe to the Court our roadmap for resolving the remaining property damage claim so the Court understands where at least the debtor thinks this process is going. As you know, we started with 4,000 or more traditional property damage claims and allegedly millions of homes where ZAI in attics allegedly posed a health hazard. The mountain of property damage claims has been reduced to 628, and while additional work remains to be done on those ZAI claims, we now know that ZAI does not pose a health hazard. We intend to cut down the remaining 628 property damage claims, Your Honor, by way of summary judgment motions. Under the current CMO they're to be filed on February 16, responses are due on March 19, replies to responses on March 23, and then arguments are set for April 9. We will try to convince Your Honor on April 9 to issue rulings at that time on the various motions for summary judgment because the trial with respect to product

identification and statute of limitations is a few weeks later and obviously getting the Court's rulings will be helpful.

THE COURT: Now, Mr. Restivo, you know, as a point of personal privilege, that April 9 date has to have some flexibility built into it.

MR. RESTIVO: We know that, Your Honor, and we are assuming that and that's going to be beyond anyone's control, but we're using that as a date because that's the date we have now.

THE COURT: All right.

MR. RESTIVO: What we hope to do with this pile of 628 claims, Your Honor, is basically chop away at it. We want to chop off the 6 Prudential claims and the 10 New York claims. You've already heard argument on it - or they've already been filed, but you haven't heard argument on it, and that will take 16, brining the number down to 612 claims. We're going to move for summary judgment, Your Honor, on 88 Canadian claims, which we believe, under the undisputed facts, are barred by the Canadian limitations period. That will bring the number down to 524. We're going to move, Your Honor, on approximately 120 Louisiana claims barred by the Louisiana statute of limitations. We're going to show the Court the identical statute of limitations rulings and identical property damage cases from the Louisiana Supreme

Court in Cameron Parish vs. AC&S and from the Fifth Circuit Court of Appeals in Orleans Parish vs. U.S. Gypsum. That will bring the number of cases down to 404. We're going to move, Your Honor, on approximately 52 Libby residences where we believe the undisputed facts are that either the home owners have suffered no damage or any damage they suffered is being re-mediated at no cost to them, and those 52 cases will bring the remaining number down to about 350. We're going to move on approximately 100 California claims, Your Honor, that we think have to be expunged due to claimants' admissions that by 1990, in fact in three different lawsuits, I think, 1982, '85, and 1990, they knew they had alleged claims of asbestos-related property damage and in fact had filed suit. We think those hundred California claims have to be chopped bringing the number of claims down to about 250. There's 25 buildings, give or take, Your Honor, where plaintiffs have agreed and conceded that they have no product identification information showing, suggesting, or implying that Grace product is involved. That will knock another 25 buildings out of this pile. Lastly, you have, Your Honor, under advisement and there's some in duplication. You have under advisement 61 claims of Mr. Speights involving alleged lack of authority or alleged late authority. If those motions are granted, that will bring the number down but there's some duplication, it won't bring it down by 61. Lastly, Your

Honor, we believe, and we're studying it now, we will file another 25 to 75 buildings where the undisputed facts will be that the statute of limitations is similar to the situation we'll brief in Louisiana, California, or Canada, or where the undisputed facts on product identification show we don't have a product in the building. That will leave about 14 days between the argument on those summary judgment motions and the start of the trial on the buildings that remain under the current schedule, which is subject to some doubt, and so we're going to try to convince the Court that if everyone briefs these issues and we have good arguments, hopefully the Court will be able to issue rulings at the conclusion of the arguments so the parties know what we're trying two weeks later. With respect to what we are trying, Your Honor -

THE COURT: You're going to expect rulings on the different theory of, let's see, 10 different theories on 650 buildings in two weeks? I just think that's not likely to happen.

MR. RESTIVO: I think, Your Honor, that we're going to put these buildings, we believe, in nice, understandable categories. I think, if we're correct on our analysis, the facts will not be in dispute, and some of the buildings, we hope, but until they see our papers, the other side may concede some of them are out, you don't have to decide, but if we file the papers on time, the Court may be in a

position, depending on scheduling, if the Court is able to read the papers, by the time we get to argument, the Court may be able to indicate on various buckets of cases whether she thinks we're going to have to try them or just where we are. The hallmark here is we're going to try to keep it real simple. If I can't understand the categories and it's not simple, we're not going to move on them. With respect -

THE COURT: It's not the simplicity of the categories, it's the amount of paper that you folks generate by way of briefs and attachments. I mean I've gotten the expert report because it was filed and I saw it, so I read it on one of the Canadian expert claims on the statute of limitations in Canada, and I think it's about 80 pages. So, I mean, if everyone of these things - and that's just one of the reports, and if everyone of these things are going to be 80 pages long, that's just not physically going to be possible to do, and that's just a report. That's not even a brief, and it's not the factual evidence.

MR. RESTIVO: Your Honor, we appreciate that, and we appreciate if we don't make it clean, precise, indisputable, short, and easy, we're not going to get the rulings. Our hope is to be able to do that in these buckets. If we can't do that and the Court says I can't rule because there's too much here, we will have caused the problem ourselves, we understand that.

THE COURT: Okay.

MR. RESTIVO: With respect, Your Honor, to the April 23, 24, and 25 hearings, where we are going to try product identification, statute of limitations, and the Libby claims if the Libby claims survive summary judgment for those buildings that are still left, it is our proposal to the Court and to the claimants that we have three days for a number of buildings and that we conduct the trial with a five-minute summary of an expert or witness's declaration or report, that we submit the declaration or report as the direct testimony and that we put the witness on the stand for cross. As the Court knows, this procedure worked very efficiently in some confirmation hearings before Your Honor. We would proposed to split the trial time 50/50 with the claimants. I have indicated our desire to do it this way to Mr. Dies and to Mr. Baena, but no one can speak for all the claimants, and so the fact that one or the other may have thought about this one way or the other, doesn't help us, and so I'm really presenting to the Court and asking the Court as an aspect of trial control, to indicate that's the program we ought to use, because I just simply can't touch base with everyone who represents a claimant.

THE COURT: I think if the principal counsel are involved or onboard with that, that has been a very effective tool in the past. It has certainly minimized some of the in-

trial time, and I think it has made good use of the witness's time on the stand and counsel's time in preparing both your witnesses and for cross-examination. It certainly gives you a good heads up about what the witness is going to testify to because you've got a whole written report to talk about it. So, from my point of view, I think that would be a fine thing, and I'm willing to do that by way of order, as long as the principal counsel are in accord with that process.

MR. RESTIVO: And, Your Honor, you'll have to hear from the principal counsel. I didn't mean to suggest or imply that while I disclosed to Mr. Dies or Mr. Baena, they indicated they were in agreement or weren't in agreement. They did indicate they couldn't speak for everybody, and at that point I realized I had to present it to the Court. Any buildings, Your Honor, that are left standing after that hearing will then be subject to the no hazard hearing set for May 30, 31. We believe by that time, whatever buildings are left will be a fraction of the 628 buildings currently remaining. We can't do an estimation, to coin a phrase, as to how many will be left, but we think it will be certainly short of 200, maybe between 100 and 200, and we would do that on the no hazard hearing. Lastly, Your Honor, coming back, we are giving consideration, and again I've indicated this to Mr. Dies and to Mr. Baena, but same issue. They can't bind all the claimants. We are giving consideration to submitting

a risk assessment report for the no hazard hearing set for May 30, 31. We have missed the January 15 deadline. We did not file a risk assessment report. We have asked them and now we're asking the Court for permission to file a risk assessment report if we so elect to do so out of time with the understanding that the claimants would have the same 24 days to respond to it that they would have if we had filed it on January 15, and we're going to make a decision whether to do such a report in the next few days, but if we are going to do such a report, we have to retain an expert. It has to be written, and so we're not going to be able to file it for a little bit of time, and we would like the opportunity to file it out of time, giving the other side 24 days to respond, and again, while I have raised this with a couple of the attorneys, since they can't bind everyone, I'm now raising it with the Court to see if there's any opposition to that and see where we are.

THE COURT: Okay, so the risk assessment would be for all the buildings that are left?

MR. RESTIVO: For all the buildings that are left with respect to the May 30, 31 hearing.

THE COURT: And how are you going to do that risk assessment until you know what buildings are left?

MR. RESTIVO: I believe, Your Honor, subject to talking to the risk assessment expert, that the information

we will have on what the information is publicly on what happens in buildings if one goes above a plenum and disturbs material and how often it happens, whether or not based on an awful lot of information in the public record already, there may be able to be a risk assessment opinion given which really wouldn't vary building by building, but again, we're still evaluating whether we need to do something like that.

THE COURT: All right. Mr. Speights?

MR. SPEIGHTS: May it please the Court. Dan Speights representing Anderson and claimants claiming under the Anderson umbrella. Your Honor, my law partner, Alan Runyan was here but left just a few minutes ago. He had to catch a plane because he has a conflict, and I just point out to you that throughout this proceeding, Mr. Runyan will be representing the California clients, University of California, Cal State, and one large commercial building which was being litigated at the time of the bankruptcy, and I'll be appearing on behalf of Anderson and the claimants claiming under that umbrella including the Canadian clients. I understand what Mr. Restivo was saying, and I appreciate the clarity of what he was saying, and I just make several comments. I have not talked to Mr. Restivo about these matters before today, which is perfectly okay, but I'm just giving an initial reaction to what he said. Number one, I point out the obvious that we're not in an estimation

proceeding. As Your Honor knows it was estimation for a long time and then at the end we changed to objections, and I pointed out well, I'll now enter the fray, since it's an objection proceeding, and I think many things that Mr. Restivo suggested to the Court would be much more possible to implement if we were in an estimation proceeding. I'm not complaining about that, but the reality is, we're now dealing with the claims objections proceeding in which claims of each of our clients, some 600 and something according to Mr. Restivo's statistics, each of our claims will be allowed or disallowed as opposed to an estimation in which we're just setting a number for all of the property damage claims, and among other things that I have quickly jotted down, while Mr. Restivo was talking, I bring out the following: First of all, Mr. Baena is not involved in this process. He's Committee counsel. We're without our order, basically, we're all claimants' counsel out here trying to come to grips with in effect individual lawsuits against our claims. We don't even have a liaison counsel. I cannot speak for Mr. Dies, Mr. Dies can't speak for Ms. Kearse, and none of the three of us can speak for the other claimants out there who are represented by counsel, and I think, just as a housecleaning matter, it might be useful if Mr. Restivo would write a letter to all the claimants' counsel and so we could see who we all are, I'm not even sure, and then have some form of

communication to the core counsel involved in this proceeding and at least by e-mail can exchange ideas and see what reactions are. The second thing I would point out, Your Honor, is that because this is an allowance process where we're going to be allowed or disallowed, presumably, that we must be vigilant in protecting the rights of our clients. For example, my reaction to Mr. Restivo's approach and Your Honor's encouragement of an approach where we present testimony in some summary way, might be, I'm not sure entirely appropriate in an estimation proceeding. Certainly in a confirmation proceeding, but if any one of my clients wants to present evidence and wants to contest matters in a different way, I'm going to have to consult with them, and I can tell you my knee-jerk reaction is, I haven't heard from Mr. Dies and Ms. Kearse, is that we probably would want all of the rules enforced and do it in the traditional way because it's an allowance or disallowance procedure. Again, I will take his suggestion in good faith and we'll caucus and talk about it and do all those sorts of things, and that leads me to the more distressing thing that maybe I'm not yet to distressing with Mr. Restivo, the more troublesome thing about Mr. Restivo's suggestion is, Well, we'll just divide the time up 50/50. Well, if I had one claimant and Mr. Restivo wanted to divide the time up 50/50, I would readily agree. What in effect that is, is dividing half the time to

W.R. Grace and dividing the other half by 600 and something claimants, and we get down to a very small amount of time on some very important issues that might take a lot of testimony. So because it is a claims allowance proceeding, I think, and I'd be happy to talk to Mr. Restivo at any time, in fact, I think I might be good if we had a meet and confer about the whole process where if the claimants' counsel are involved and Mr. Restivo and see if we can assist the Court in trying to deal with this massive problem.

THE COURT: I think that's a good idea. I think what I will do is have the debtor set up an order that requires all claimants' counsel and debtor's trial counsel to appear before the Court and we'll set up the process because from my perspective, the debtor has the burden of proof with respect to the claim disallowance after, of course, the claimants come forward with the presumptive evidence that substantiates the *prima facie* validity of the claim, which based on the proof of claim having been filed. I assume you're pass that burden, and that's a claim-by-claim analysis. So the 50/50 sharing of the trial time seems to be appropriate. The debtor has the burden of proof. You've got a burden of proof, and with respect to that burden that allocation seems all right. With respect to the process involved, I mean, I've used this process in claims allowance trials and preference litigation and fraudulent conveyance

litigation and all sorts of things, so, I don't think the process has to be limited to the estimation process, but I certainly agree that your clients have to feel comfortable with the fact that their rights are being adequately protected and understand that if a witness's direct testimony, an expert witness's direct testimony is going to come in by way of the report that the cross-examination live and the rebuttal live is certainly going to be adequate for their purposes, and I wholly agree. So I think the thing to do is to get everybody in, in person for a live pretrial conference, and maybe some of these issues can be flushed out in that respect.

MR. SPEIGHTS: And that leads me to my next point, Your Honor, it's a little bit of a chicken and an egg, when Mr. Restivo is arguing about how 600 are going down to just a few claims, well, if the Pittsburgh Pirates' new first baseman, Adam LaRoche, hits 90 home runs, the Pirates may win the World Series this year, but we can't count on Mr. LaRoche doing that. He didn't do it for the Braves. So, Mr. Restivo can come and give all his numbers and say we're going to get down to this and that, and if we got down to that amount, maybe some summary procedure would be easy, but I happen to believe that the number's going to be far north of where Mr. Restivo is, that you will find factual issues in most of those motions for summary judgement, and it's a chicken and

an egg because we're not going to know until sometime in April. So agreeing to some procedures before we know whether we have limited the scope of this hearing dramatically is a very difficult thing. Again, we're happy to talk to Mr. Restivo about that, and finally, Your Honor, I'm trying to be brief. I've got other counsel here. On the risk assessment issue, I would - you know, my philosophy is that you work with opposing counsel on these issues, and Mr. Restivo has generously agreed that I can list Dr. Frank Lee (phonetical), and I appreciate that, and I'm sure I'll work with Mr. Restivo about the risk assessment person. It may be when I talk to him I might say, Well, now, if you're introducing a risk assessor person, we might want, I doubt it, a risk assessment person too, but I believe that I can and I believe that other PD claimants can work with Mr. Restivo to narrow the disputes. I think it is the nature of the animal that is an allowance procedure involving 600 claims that will challenge even the most cooperative counsel to come to grips with this. Thank you, Your Honor.

THE COURT: Mr. Baena, does the Committee have anything to add?

MR. BAENA: No, Your Honor, we don't.

THE COURT: All right.

MS. KEARSE: I haven't had the pleasure, Your Honor. My name is Anne Kearse. I represent a number of the

claimants with the Motley Rice firm, and I think it would be a good idea to have a meeting. I just wanted to share a couple of my concerns, Your Honor. One is on the expert issue. A lot of these claims are going to be very factually driven, and as I'm just getting into the fray in working with Mr. Baena on how am I going to prepare my clients and what do I have to do coming up, I'm concerned about the process of having to get a lot of individual factual witnesses here in a limited amount of time. I think those are things maybe if we sit down with Mr. Restivo on how we do that. I think that's a huge concern on my part not so much from the experts, just on a procedural point. If we have 600 buildings, I think there's an assumption that we're not, but to the extent we have a great number there, honestly, I don't see how it's done in three days or how we even plan a day on each claimant on how we get across that process there.

THE COURT: Well, I'm not sure of that either. If there are going to be 600 buildings and 600 building owners, I'm sure we're not going to get done with that in three days. However, there are some uses of trial techniques that don't necessarily always require you to have live witnesses here, and you can certainly - if you choose to do it, not have to bring all of those witnesses here, if you want to, obviously that's fine. I'm happy to hear live witnesses, but, you know, some of your building owners in California and Texas

and Canada may not want to make live appearances. You can use video depositions, you know, you can preserve testimony for trial in some instances. So there are some other techniques that if you choose to you may certainly use for that purpose.

MS. KEARSE: And that's why I think we need to sit down and go over those things, and the time period between the motions for summary judgment and getting prepared for trial too is going to be an issue if we can, you know, have that time prepared there as well. And, Your Honor, I've talked to Mr. Baena with some things too, and I'm not sure if any of these procedures would be revisited in a trust distribution process there or if that's been discussed with Your Honor on - deal with some of these issues where perhaps it's not all claim by claim in a trial basis, but there may be some format to actually set up procedurally if there's issues on PID, particularly on the amount of square footage you're going to have in buildings and if we're going to be fighting whether or not there's 2,000 feet versus 5,000 feet. The way it's set up now, it seems like we're going to be litigating those same things during the PID process of the mini-trials there.

THE COURT: Well, now, that's something I wasn't thinking that was going to happen before me. Mr. Restivo?

MS. KEARSE: As I read some of the objection, Your

Honor, that's -

THE COURT: Okay.

MR. RESTIVO: I think how many square feet, Your Honor, is really a damage question, and I don't think that's part of these three trials that were set up. I mean at some point, we may get to how many square feet, but - and I'd be happy to talk to anyone about it. I see that as a damage issue, and I don't see what we're doing right now as damages. My reaction as to what has been said are as follows, Your Honor: I have not talked to all of the property damage counsel. I'm not even sure I know who all the property damage counsel are to whom I should be talking. I was under the impression that there was supposed to be Mr. Dies, who was special counsel. Once we did the stipulation, it was no longer Mr. Dies. I'm willing to talk at any pretrial conference with whomever we need to talk to so, if I want more time to file something, I can bind everyone. Secondly, we appreciate that if we are going to chop into this pile of 628 claims we have to chop into them in groups. We have to present to the Court a group. We will try to convince the Court if a 109 California buildings filed a lawsuit in 1990, having the same claims they have now, the statute of limitations has run. I mean, the Court will either agree with us or not agree with us, but we're not going to present that as to each of the 109 buildings. And so, we're willing

to have a status conference as soon as the Court wants to have it primarily because we don't know who to talk to otherwise so we can bind everyone on a procedure I do think the Court, under its general powers to control its courtroom once it hears what people think about a process, certainly can institute whatever process makes sense that you don't need unanimous agreement, the Court has the power to control the introduction of testimony.

THE COURT: Okay, well, I guess the question, maybe Mr. Dies should be the appropriate person to answer this. I'm not sure. With respect to the 628 remaining claims, I take it since they're all building owners, they all at this point either have counsel or represent themselves, so we must on the proof of claim forms have an identification of who has submitted the claim and have an entity to notify as to how to set up a status conference.

MR. DIES: Well, Your Honor, I'll let Mr. Baena address that. He's looked at the claims more than I have. I just wanted to say a couple of things: One, I do think we have to have more information. We've got disparate state laws. I've seven states. We need to get the claimants in, obviously. On the issue of adding the risk assessment, for the record, I told Mr. Restivo I'm inclined to agree to that, subject to working that out. I just wanted to say that. So, in terms of identifying the claimants, I think that our

Committee counsel has been in touch with most of them. We should hear from Mr. Baena on that.

THE COURT: All right.

MR. BAENA: May it please the Court, Your Honor. May I speak from here?

THE COURT: I can't really hear you from there, Mr. Baena.

MR. BAENA: May it please the Court, Scott Baena on behalf of the Committee. We're happy to share with Mr. Restivo what we believe, our clients and counsel for property damage claimants, we principally get that information from proof of claim forms and contacts that have been made of us. Some have made appearances already in respect to their claims, and those are the easy ones. But we'll share that information.

THE COURT: Okay, so, is there a way that working with the Property Damage Committee we can get a status conference set up for just the purpose of assessing, I guess summary judgment - those procedures are pretty well established, but also the trial procedures?

MR. RESTIVO: Yeah, I assume what we would do is we would get a list of names and addresses, and send out a notice that there will be a status conference before Your Honor at such and such a time and place, and whoever shows up shows up.

THE COURT: Well, no, I want it more specific than that. I want it to say that we're going to be specifically addressing the trial procedures and that the order that comes out of it is going to bind everybody. So you either appear or you don't appear at your own risk, but the order that comes out is going to bind those procedures. So it's going to be a very specific order so that everyone knows if you choose not to come, that's okay, but if you don't come, you don't come at your own risk.

MR. RESTIVO: I think we can work on that. I think it's just a matter of language. I think the only question is what date should be put into that communication.

THE COURT: Well, this is the end of January, already. I would assume we should do it maybe some time in February. There isn't really that much of an urgency to get the trial process done. We have to get through the summary judgment process first anyway. So, the next omnibus hearings are the 27th?

UNIDENTIFIED SPEAKER: 26th.

THE COURT: 26th?

MR. BAENA: Your Honor, just to conclude the part of this conversation I'm involved in. We will provide that information to Mr. Restivo by Friday.

THE COURT: All right, thank you. Mona, do you have DeCal up here? Are they - Pittsburgh DeCal?

MR. RESTIVO: Your Honor, as we're looking at the calendar, our motions for summary judgment have to be filed by February 16th. I think it would be helpful to the Court and the participants to know what chunks of buildings we're moving on and so it seems to me that sometime between the 16th and the omnibus, if the Court has time available, would be good rather than have a meeting and then we hit everybody with a whole bunch of summary judgment motions.

THE COURT: Well, yeah, what's surprising me is that the dates that Ms. Baker handed me, tell me I have partial days through most of that next week, which just doesn't seem right, because I hardly have for the next year a whole week of partial days open, so there just seems to be something not right about this, but I don't know what it is because I don't have access to the calendar.

MR. RESTIVO: I should say, Your Honor, that Mr. Dies and I were hoping to score brownie points by giving you back full days of January 29, 30, and 31.

THE COURT: Actually you did, Mr. Restivo, both of you. I'm going to come around Mona, so I can see what you've got there. Well, I actually do have two partial days that week, so, I can do this either on - This would have to be in Pittsburgh, either on February 20th or February 21st, which is Tuesday or Wednesday.

MR. RESTIVO: Either day is fine with us, Your

Honor, and we will just have to live with the fact that it's going to be in Pittsburgh.

MR. SPEIGHTS: Well, since I have to travel, unless Your Honor wants to come to South Carolina.

THE COURT: I'd love to.

MR. SPEIGHTS: I would prefer the 21st.

THE COURT: Okay. I can try to arrange this by a video conference call if there are some courtroom locations where people can participate, but quite frankly, if there are going to be, you know, as many as 200 lawyers or something in this process -

MR. RESTIVO: Your Honor, my guess is 10, 15 at the most.

THE COURT: Oh.

UNIDENTIFIED SPEAKER: Slightly higher.

MR. RESTIVO: A little bit higher but we're not going to have 200.

THE COURT: All right. Is there - Would it be beneficial in these circumstances if these are pretty big claims to try to get everybody in court anyway? I do have two conference rooms where sometimes I can put people and throw away the key to try to see whether settlements can be negotiated.

MR. SPEIGHTS: I think the major claimants, that is those with the most claims, including the three firms

represented here today would be in Pittsburgh on the 21st.

THE COURT: Anyway? Okay, you wanted the 21st; is that correct, Mr. Speights?

MR. SPEIGHTS: I would prefer that, Your Honor.

THE COURT: Wednesday.

MR. SPEIGHTS: The previous weekend is President's weekend holiday and that Monday is a holiday, so I would prefer it being on Wednesday.

THE COURT: All right. We'll do a status conference on all property damage claims to set a process for trial in Pittsburgh on February 21 - Do you want to - If everyone's coming in from out of town, start at 11? Or 10 o'clock? Or will you have to come in the night before anyway?

MR. SPEIGHTS: Well, I'll probably have to come in the night before, but there are those, for instance, Prudential I know is represented by New Jersey counsel, probably could come that morning. So I'm not the one to ask. I mean, I think the three of us would probably have to come in the night before but there are many others, apparently, I don't them.

MR. BAENA: My recollection, Judge, for what it's worth, is that if you don't set it at 12 or later -

THE COURT: It doesn't matter?

MR. BAENA: - nobody can travel that morning.

THE COURT: All right then I'm going to start it at

9 o'clock because frankly I hope to have some meaningful discussions with the parties anyway, so, we'll start at 9 o'clock in Pittsburgh - the whole purpose is to set a process for trial and to see whether or not any of these issues can get resolved short of trial and further summary judgment arguments. And you will notify, Mr. Restivo, everyone that all trial counsel must appear, all trial counsel must appear.

MR. RESTIVO: Your Honor, if you made that direction to Mr. Baena and myself that we would work together to send out the communication.

THE COURT: I would like to do an order. What I'm directing is that you give me an order that will say, All trial counsel must appear. Mr. Baena has already said that he will assist you -

MR. RESTIVO: Fair enough.

THE COURT: - making sure that the appropriate list gets notified. I want to do an order that directs all counsel to appear.

MR. BAENA: Judge, just anticipating all the comic possibilities here, there may be counsel that have very few claims that are implicated by all of this that may not wish to travel to Pittsburgh because of the cost and time and what have you. Will you allow them to appear telephonically?

THE COURT: How many people have, let's say, you know, fewer than three buildings involved in this process?

MR. BAENA: I would not be candid with the Court if I attempted to answer that without our files in front of us. We just know that there are counsel who represent very few buildings, and I can think of one, I believe, is in San Francisco. I don't know if he's going to want to travel from San Francisco.

THE COURT: All right. I'll have the debtor set the Court Call arrangements up.

MR. BAENA: Thank you.

THE COURT: But, anyone who wants to appear by Court Call has to call me in Pittsburgh, call my staff in Pittsburgh, and tell me why they want to appear by Court Call because I want to make sure - The purpose for this is to try to get everybody into a room and negotiate a process that's going to work. I really think in this instance, it would be helpful to have everyone there.

MR. BAENA: Maybe that's all you need to do is say that in your order, Judge, as opposed to filtering through those kinds of calls. If you could say, It's the Court's preference that you be here in person but Court Call will be available if there is no way you can do that.

THE COURT: Mr. Baena, it's not uncommon for federal court judges to tell the trial counsel to come for a pretrial conference. My preference is that counsel appear, and I'm exercising that prerogative. If people want to be excused

from it, they can tell me why and I'll consider it on a case-by-case basis. I don't want to add unnecessarily to the cost of prosecution. That's not of a claim. That isn't the intent, but I do want to make sure that this process is as orderly and actually as expeditious to try to get this as resolved as possible. So, I really would prefer in this instance that everybody be there.

MR. BAENA: I appreciate that. I just don't want the next shoe to fall being the, you know, the disallowance of a claim because counsel couldn't get client permission, couldn't make it or whatever, and they're representing a single claim.

THE COURT: All right. All counsel must appear unless excused by the Court for cause. That's what the order is to say. Debtor's to set up Court Call for anyone who is excused from physical presence. If there is an unrepresented claimant - I think that's unlikely, but if there is, those people may appear by phone. I will accept those people's representation by phone.

MR. BAENA: There may well be some.

THE COURT: All right, I will -

MR. BAENA: And it may be governments.

MR. RESTIVO: Yeah, well I think I've seen like half a dozen individual property owners where I'm not sure we have counsel, but they'll be on the list, and they can appear by

phone, and we'll take care of that.

THE COURT: All right, they may appear by phone. Okay, you can take a draft - a stab at the draft order and if I'm unhappy with it, I'll modify it. Okay? So, that you can submit it on a certification of counsel after you and Mr. Baena have a chance to look at it, Mr. Restivo.

MR. RESTIVO: The only other thing I have, Your Honor, is item 13 where there were no objections, and I don't know if the Court has signed that order, yet, and I have another copy if the Court would like another copy.

THE COURT: I'm sorry, on what?

MR. RESTIVO: This is number 13, the order regarding the methodology issue for asbestos property damage claims that does away with the January - This has been on file since -

UNIDENTIFIED SPEAKER: (Microphone not recording.)

MR. RESTIVO: Okay.

THE COURT: Okay, I'll take it, Mr. Restivo. Thank you. Oh, no, I'm sure I signed this order. Whether it's not been docketed yet or not, I don't know, but I had a discussion with my clerk who assisted in the preparation of the ZAI opinion about specifically what this meant because, frankly, I don't know what it means.

MR. RESTIVO: If it's been signed, Your Honor, it hasn't come to our attention yet, and that's fine.

THE COURT: Okay. What does it mean?

MR. RESTIVO: It means what it says, Your Honor.

THE COURT: You're asking me to sign this order, Mr. Restivo, I would like to know what it means with respect to what you're going to do for the estimation hearing.

MR. RESTIVO: That will probably be a subject of discussion at the pretrial, Your Honor. I think it's pretty clear, but I suspect my colleagues might disagree with me. The words in that stipulation took about a week to negotiate every word has meaning to someone, and I'm not sure I'm the right person to try to explain what the meanings are.

THE COURT: All right, well, I guess I have my own spin on what it means, so we'll find out later on my own spin as to the meaning of the order I'm entering is right at that hearing. Okay. I think this should have been docketed. If it hasn't, I'll have it docketed, but I did already sign the order. Okay.

MR. BERNICK: I think there's only one item left on the agenda. Actually it's a couple of items but they relate to the same thing, and that is Anderson Memorial. I have actually suggested to Mr. Speights that maybe we can take this up because it keeps on moving and moving and moving. I don't know if there's a press to do it today, but Mr Speights would like to take it up, and that's fine. What is there to report? There is to report that the Court file was,

I believe -

MR. SPEIGHTS: May I, Your Honor, just to clarify that. I said if there is a motion to compel, which is my motion, and I would like to take that up. It's fine if Mr. Bernick wants to go into the whole history of Anderson and everything again, and I'll respond to that, but all I requested was my motion to compel be heard on the document custodian.

THE COURT: All right, that's fine.

MR. BERNICK: Okay, I'll be happy to follow Mr. Speights.

MR. SPEIGHTS: Your Honor, my goal is to make the shortest argument ever made to you in a contested matter in the W.R. Grace bankruptcy, and I told Mr. Bernick when he suggested putting it over, I said, I can't do that, but I'll be happy if you will just spend as little time as I will on this matter, and we'll get out of here, and we'll see whether I'm as short as I think I will be, or plan to be on this argument. Your Honor, as you know, we instituted discovery over a year ago in response to certain statements made and the debtor's opposition to the certification brief. The debtors moved for a protective order saying no discovery should be had. After the mediation efforts failed and we had one or two or three hearings, Your Honor said on two or three occasions that I'm entitled to some discovery. In October, I

sent out a simple notice to take the deposition of the records custodian of W.R. Grace, the custodian of those records pertaining to Anderson which existed as of the petition date. That is the narrow scope of a narrow form of deposition. I am not seeking documents. I'm not seeking anything that was generated after the petition date. I just want to sit down and presumably it would be less than an hour to deal with what documents exist. I'm not raising issues of privilege. I'm not raising questions of relevancy. It's just a documents custodian's deposition. And, Your Honor, for the life of me I don't know why Grace opposes that. Why can't I get to find out what documents they are? Grace has taken the position, among other things, that at a certain point, discovery is excessive. It's too costly. It's too time consuming. It's harassing. My request and other requests for documents are extremely burdensome and overly broad. Your Honor expressed a concern that my requests were overly broad and made me redo the request, which I have done, and they've answered, and they have now objected to producing a lot, although they gave me a few invoices the other day. So, I just want to cut to the chase, Your Honor. If I take a deposition of a person who knows what documents exist as of the petition date related to Anderson, and that person tell me there are hundreds of boxes located all over America, I've got a big uphill climb. There's some substance to these

assertions that have been made. But if I go take that deposition, for less than an hour probably, and I find out all of the documents relating to Anderson and I'm not interested in pleadings, all the documents related to Anderson other than pleadings are in three file drawers somewhere, then we won't have to be arguing to you about it's oppressive, and it's burdensome, and we can't do a privilege log and all those things. So I just ask if you'll let me take a documents custodian, and then that will place the context of the rest of - that will give us context to the rest of the discovery I'm seeking. Thank you, Your Honor.

THE COURT: Okay. Mr. Speights, may I ask, because I'm still lost about what I'm supposed to do with the Court record. I thought once you folks got the South Carolina court record copied, that I was then going to get something from you that told me what I was supposed to do with that court record and I haven't. So, I'm kind of on hold with respect to your motions and the debtor's motions because I thought they were somehow tied up with this court record and so I've been waiting and not doing anything until I find out what I'm supposed to do with the court record and how it fits into this mix.

MR. SPEIGHTS: I'm sorry for the confusion, Your Honor, and I don't - the short answer is I don't think you're supposed to be doing anything from my standpoint. I envision

filing a supplemental brief when I finish my discovery which would incorporate what I found in discovery and what's in the court records before Your Honor, in anticipation of the final hearing on Anderson's certification, and so, until I get my discovery, it's premature to be filing that brief but I will be referring to parts of the record which are now before you from South Carolina. I could probably go ahead and do that, but I think we'd be spinning our wheels until we finish this aspect of it. I envision if I get my records custodian, I'm going to file a motion to compel on the other outstanding discovery so I can point to you at that time, hopefully, that my discovery requests are extremely narrow, and they're all in a file drawer in Boca Raton or one in Cale Gordon in New York.

THE COURT: Okay, so the South Carolina record does not impact on your discovery motion except that you now are not asking for pleadings, it's simply something that you're going to argue in terms of the final class certification hearing.

MR. SPEIGHTS: That's correct, Your Honor.

THE COURT: Okay. I apologize. I misunderstood. I thought somehow you wanted to mix together those two documents and so I've sort of been holding off on the discovery issues.

MR. SPEIGHTS: I'm sorry, and I don't envision that.

I don't know what I'm going to learn in discovery, whether I'll refer you to something on a motion to compel, but I can't envision that. I wanted to be able to refer to that portion of the record under seal during the argument on the certification.

THE COURT: Okay, thank you.

MR. SPEIGHTS: Thank you, Your Honor.

MR. BERNICK: Your Honor, it's a bit late to have the shortest argument, because this is about the fifth time that we've been through this whole process, and nothing really has been done by Mr Speights on behalf of his client to comply with what your order Your Honor has now repeatedly order that he do. This is all related to class certification, and we now have had several arguments where Your Honor has made clear that (a) settlement matters and settlement discussions are off limits; (b) with respect to any discovery that takes place, it must be tied specifically to an issue on class certification. I can go back over the record and quote back to Your Honor, but I know that Your Honor will recall that. Where things were left at the end of the last time, because there was a paring of the custodial deposition in the document requests. We can't comply with the requirement to produce a custodial deponent without actually learning where all the documents are. He was to go back and narrow and focus his document request on specific

matters that are germane to class certification. In connection with that, because we had discussion about what really are we talking about that is germane to class certification anymore, that being a motion that was argued more than a year ago, or almost a year ago, Your Honor asked us whether we would be prepared in connection with class certification to agree that adequacy of counsel was not at issue because that apparently drove a lot of the requests for discovery. We have made that undertaking in that agreement. So, adequacy of counsel is not an issue. Numerosity of claimants is not an issue because Your Honor has said in court specifically ruled that we now know how many claimants there are because we had a bar date and we had people show up. In Your Honor's words, quote, "The universe of claimants are those people who filed a proof of claim." And we know with respect to South Carolina there are only three such claimants that remain. So numerosity cannot possibly be an issue. In any event, without predetermining that, Your Honor said what is, I want you to go back and to be specific. And I have Your Honor's words here that you have to have the specificity, I want you - you said, Mr. Speights - and this was God knows when, I want you to recast the deposition notice and the discovery request because the two are obviously linked, tying the class of documents for the nature of the deposition testimony you're looking at to an element

of Rule 23 so that when, Mr Bernick, I want you to raise every objection you intend to argue. I'm not going to have another proceeding like this where I hear objections to relevance and delay. When they get there, I've got Rule 408 and settlement issues in over-breath argued. And so the direction was very, very clear and specific. It's not a question of how long is the deposition going to last. It's a question of what the deposition is about if anything, and the touchstone of that has to be the underlying documents. So, we needed to have a focus document request that complied with what Your Honor specifically said, which is it has to pertain to an element of Rule 23. What we have now gotten back is a document request that goes to - I think it's 16 or so different paragraphs, 16. Now, these document requests are no different from what's been pursued historically, which are all kinds of matters that relate to the merits of Anderson Memorial but not to any issue that actually is a live issue in connection with class certification. So, a total of zero progress has been made. If we were to produce a custodian because Mr. Speights believes that it's so simple to do so, who actually is responsive to all these different categories, yeah, you're talking about very, very broad stuff, all documents generated prior to the petition date for this case which refer or relate to Anderson's lawsuit. This is the very thing that Your Honor specifically told Mr. Speights

back in the fall that you didn't want to see, and yet it's here again, and we have objected to it. So, I didn't think it was appropriate to take this up today because inevitably Your Honor's going to have to take a look at what he's now done on behalf of his client to so-call narrow the focus of the document request, which is the subject of the deposition. We don't really have the time, and it's not before Your Honor, and we can go through all 16 of these, because we cannot produce a deponent and meet our obligations without reference to a document population request. And this is no different than the way it was before, and is not our obligation to come forward and say, Let me tell you where all these documents are that relate to things that are not at issue in class certification. That's all that we're talking about. So, zero progress is made, none. He has not followed Your Honor's instructions. We are no more able to produce a document custodian on these incredibly broad and undefined categories than we were before, and our objections have now been stated, we think every single objection that we possibly have. So, Your Honor, there's no issue about whether we set them out, and I believe the matter either should be denied or if we're going to go through this, we just set it over for the next omnibus. There's no hearing. I mean there's nothing that's emerged in this process that changes one iota of the numerosity issue, which is really at gut-level the

reason why it doesn't make sense to have class certification, not only under Rule 23 but under American Reserve which says, It's not really Rule 23 that has to be met, but it has to make sense in the case, and how in the world it can make sense when we now have the three claimants who are going to be before the Court defies the imagination. In any event, we believe that this ought to be put over to the next time, and if Your Honor believes that we have to, we can go through the document requests and see whether Mr. Speights has complied with Your Honor's clear direction the last time this was argued to tie it specifically to an issue that's an active issue on Rule 23.

THE COURT: Okay. I think at least - Oh, I'm sorry, Mr. Speights, go ahead.

MR. SPEIGHTS: Well, if you're going to rule with me, I'd sit back down, Judge.

THE COURT: No, I was going to say that I think that based on the briefs that you've submitted and my misunderstanding because I thought I was waiting for more information from you with respect to the case file, that I probably have what I need in the office to make a ruling based on the document submission that you've made and the debtor's opposition to it. So, if there's more that you want to argue, I prefer you do it now and when I get back to Pittsburgh, I'll just attempt to give you a ruling.

MR. SPEIGHTS: A ruling on the discovery or certification?

THE COURT: No, no, on your discovery request.

MR. SPEIGHTS: Your Honor, then the only thing - I'll be very quick. We did recast our discovery. Mr. Bernick raised the same objections, overly broad, et cetera. I'm trying to clarify one point before we argue about that discovery, and with all due respect to Mr. Bernick and most every lawyer does it, lawyer talk is not the same thing as what the reality is sometimes. We're advocates. In essence all I've said is give me the records custodian for the Anderson file that existed before the petition date. They're not documents in Tokyo. They're not documents all over the country. There was a case file, and it was managed by Grace, and there is somebody there already who knows where the Anderson file would be located and generally what is contained in the Anderson file. It may be one location or two or three, and if that person doesn't know an answer to some question, he or she can say he doesn't know, but if we could just find out if we're talking about a file cabinet or a file drawer of documents, we will save ourselves a whole lot of time before we argue all of these motions to compel. The only other point I make, Your Honor, is, you know, I've been trying to discover this for a long time, I believe today I can go ahead and serve a new request for the custodian in

the objections proceeding. They've objected to Anderson's claim, and we'll be right back here, and that will just be another 30 days or 45 days. So I just don't see the problem. What is the problem of me deposing somebody who's familiar with what files exist on the Anderson Hospital case that existed from '92 to 2000 in the Court of Common Pleas.

MR. BERNICK: Your Honor, I'd say for purposes of your consideration of this there is the new document request which Mr. Speights has now represented complies with Your Honor's clear instruction last time, and then our objections, and I don't believe that the new document request or our objections per Your Honor's instructions have been submitted to the Court.

THE COURT: I'm sorry? You don't think -

MR. BERNICK: Your Honor, he says he filed, you know, narrower requests. Your Honor directed us to object and to raise any issues.

THE COURT: Yes.

MR. BERNICK: So we objected and raised any issues. I don't believe that the new requests and our responses to those requests have been submitted to the Court. So you right now don't have before you the documents with respect to which he's asking to have this easy custodial deposition.

MR. SPEIGHTS: I agree with that.

THE COURT: Oh, well then, I can't rule.

MR. SPEIGHTS: I just wanted, no - I thought that it makes sense, and Your Honor can take it under advisement as you indicated, I thought it made sense to let's take the custodian deposition before I filed a motion to compel on those latest responses so at least we can quantify what's there. Your Honor, if you disagree with me, I'll file a motion to compel there and Mr. Bernick will be back saying, Your Honor, this is overly broad, we'd have to search everywhere in W.R. Grace's empire to find these documents.

THE COURT: How about doing this, gentlemen, because honestly you just lost me. How about doing this: Put together for me in one binder what it is you want me to rule on. If you want me to rule on a motion to compel, fine. Put it in a binder, give me the motion to compel, give me the response, you know, give me the specifics of what it is you want me to rule on, but only give me the specifics. Don't give me everything under the sun. If you've got some agreement, I don't need it. Just show me the question that you're objecting to, what the objection is, what any responses that you are objecting to, that's all I want. With respect to the depositions, put everything in a binder that you want me to rule on. Send it to me in Pittsburgh, and I will give you rulings on the discovery, the outstanding discovery requests, because I think somehow in the course of these arguments, I simply have lost track of what is still

open. I know I haven't given you firm rulings. I have tried to steer this process through, obviously unsuccessfully. So, you need some rulings. You need them now so you can get this discovery either done or underway or whatever the rulings are going to be. Put it all for me, please, in one binder. Mr. Speights, whatever your requests are; Mr Bernick, your objections; Mr. Speights, your responses, and then I will give you rulings.

MR. BERNICK: You're not asking for new briefs to be done -

THE COURT: I don't want new briefs, just give me whatever it is that is - whatever has not been adjudicated that you want an adjudication on. Just send it to me in one separate binder, please, so that I have it all together in one place and can make a ruling so I understand that I haven't missed something, and I know I'm not waiting for anything more.

MR. SPEIGHTS: Thank you, Your Honor.

MR. BERNICK: Thank you.

THE COURT: Okay. When can I expect it?

MR. BERNICK: Well, I think we should be able to get that to you within a week.

MR. SPEIGHTS: I think it's a matter of days because it's very simple what I want Your Honor to rule on, it's one matter outstanding.

THE COURT: Okay, well, I want you to put it all together in one binder so I have it all -

MR. SPEIGHTS: It's a very thin binder from my standpoint that I'm asking -

MR. BERNICK: Your Honor, I take it that you want a binder that contains what both sides -

THE COURT: Both sides. I want everything together in one binder, both sides, everything in one binder. So, whom am I going to get it from?

MR. SPEIGHTS: Your Honor, I think - let me just say this, because I don't want to have anymore confusion or anymore continuances. There is one motion pending before Your Honor. It's a motion to compel the documents custodian deposition.

THE COURT: Okay.

MR. SPEIGHTS: And if I sent you a binder based upon on what I think you want, that's what I would send.

THE COURT: Well, I have that motion.

MR. SPEIGHTS: Now, I know that there were going to be more discovery disputes but I have not filed an additional motion to compel on new discovery that has now been answered. I made a judgment and I would rather have this motion to compel heard first.

THE COURT: Well, I have that motion to compel.

MR. SPEIGHTS: And that's all I'm asking. That's

the only motion outstanding, is a motion to compel the documents custodian.

MR. BERNICK: Your Honor, Your Honor, this is an unbelievable kind of thing. The motion to compel relates to a deposition notice.

THE COURT: Yes.

MR. BERNICK: The deposition notice has already been discussed. Your Honor already has ruled and the direction was very simple which is that you should recast the deposition notice and the discovery request because the discovery request is what the custodial deposition is all about. It's documents. So, Your Honor can't even consider the custodial deposition until you know what it is that Mr. Speights has done to comply with Your Honor's direction that he narrow the focus of the documents that are the subject of the custodial deposition. So the two things are tied together, the document request and the custodial deposition. He's got a motion to compel the docket on the custodial deposition. We've got an answer. The additional piece of paper is (a) Your Honor's directions to him the last time, and (b) his effort to comply with that direction, which are new requests, and then our objections which Your Honor also asked for at the same time. That's the package. So you know the deposition, you've got the briefs and what the deposition is supposed to be about, which are the documents that are the

subject of the requests.

MR. SPEIGHTS: Your Honor, that is absolutely wrong. It is absolutely wrong. You know, and I know you get frustrated. Let me just clarify. We had all these arguments and you said to recast, and all that happened, and there were notices of deposition outstanding, there were requests to produce outstanding, and you told me to recast and I recast them. In addition, after that hearing, after that argument, I served later, never been before the Court, a motion to take the custodian's deposition. That's what's before Your Honor.

THE COURT: Okay, look, whatever - I don't care. Whatever it is that you folks want me to rule on, I go back to what I said before, whatever it is that you think I owe you an order on that relates to the Anderson Memorial deposition, put it in a binder, one binder. Mr. Speights send your material to Mr. O'Neill. Mr. Bernick send your material to Mr. O'Neill. Mr. O'Neill, do an index, put them behind tabs, and send me the binder. Okay, whatever they send you, just put it in a binder and send it to me in Pittsburgh, please. Okay, that's what I'm going to do. As soon as I get that binder, I'm going to take it home, make it my bedtime reading for a night for which I'm sure my husband will be more than grateful to all of you, and then I'm going to give you a ruling on these issues.

MR. SPEIGHTS: Well, tell him mine was the little

part of the binder.

THE COURT: Okay. Will that be able to be done within a week?

MR. BERNICK: Yes, Your Honor.

THE COURT: All right. I will expect it within a week. Okay, what else is there today?

MR. BERNICK: There was a status conference on the motion for class certification with respect to Anderson Memorial, but I suppose you've already had that in a sense that there's nothing more I believe that there really has to be discussed on that subject.

THE COURT: Until I get this discovery issue done, correct.

MR. BERNICK: Well, that's correct, and our position is that it's totally irrelevant. That is correct, the discovery issue is there. We've given up on the idea of having an expedited consideration of any of this because it was argued last hearing and it obviously is not happening. So, we're happy to have the motion for class certification, you know, put on hold until this discovery issue is resolved, and at that point Your Honor can take it up again.

THE COURT: Okay. This discovery issue will be resolved. I will do my very, very, very best to get this resolved absent some bomb going off in Pittsburgh or something equivalent to that before the next omnibus. So, at

the next omnibus hearing, hopefully we can take up whatever the process is going to be that actually gets us to a ruling on the class certification issue. So, Mr. Speights, whatever discovery and so forth that you're going to need or briefing or whatever, please, see if you and Mr. Bernick can talk about it when you get my ruling on the discovery issue to see whether some time frame can be done. I really would like to get this off my desk just as much as you folks would like to get it off yours. So, I would like to move this issue along. Okay.

MR. BERNICK: That is all that the debtor has for today, Your Honor. We appreciate -

THE COURT: All right. Anyone else? Any housekeeping matters or other matters to address? Okay, we're in recess. Thank you.

(Whereupon at 1:42 p.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of proceedings in the above-entitled matter.

/s Elaine M. Ryan January 29, 2007

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